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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

CREEK NATION, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 29, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 124

CREEK NATION, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1] [File endorsement omitted]

BEFORE THE

INDIAN CLAIMS COMMISSION

No. 292

THE CREEK NATION, Plaintiff,

v.

THE UNITED STATES, Defendant.

PETITION—Filed August 10, 1951

To the Honorable Commissioners of the Indian Claims Commission:

The plaintiff, the Creek Nation of Indians, respectfully represents:

I.

That by a certain Act of Congress, approved August 13, 1946 (60 Stat. 1049; 25 U. S. C. 70), the plaintiff was authorized and empowered to present this claim for final determination. That this claim is not included in any suit pending in the Court of Claims, or in the Supreme Court of the United States, nor was it pending in the Court of Claims under any legislation in effect on the date of the approval of said Indian Claims Commission Act.

Proof of Service (omitted in printing).

[fol. 2] II.

That plaintiff is known as the Creek Nation of Indians, and has always been recognized as such in treaties and agreements between it and the United States; that it has

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"The page references throughout this record are to pages in the original record."

a duly elected Principal Chief holding a Commission as such from the President of the United States, and a Creek Indian Council, which are representative of said Creek Nation, and are so recognized by the officers of defendant charged with the responsibility of administering Indian affairs.

III.

That at all times mentioned herein, and for many years prior thereto, the Creek Nation was the owner of trust and other funds, which represented the considerations given by the United States for the cession of certain of plaintiff's lands, and which said trust and other funds were held in trust by defendant, and paid and administered for the use and benefit of plaintiff. That there existed certain treaties between plaintiff and defendant, whereby said trust and other funds were to be managed and invested and otherwise disposed of by defendant for the benefit of plaintiff, said treaties being hereinafter more specifically referred to.

IV.

That Article II of the Treaty of June 16, 1802, between the Creek Nation and the United States, (proclaimed January 11, 1803, 7 Stat. 68, 2 Kapp. 58) provided in part as follows:

> "The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for [fol. 3] the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz; Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from

Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek Nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. * * * "

That although said treaty became effective on January 11, 1803, and defendant's total obligation thereunder amounted to $320,000, the defendant disbursed $232,690.25 only on said treaty obligation, and therefore the amount of $87,309.75 is due and owing to plaintiff from defendant for defendant's failure to fulfill said treaty obligation.

V.

That Article III of the Treaty of November 14, 1805, between the Creek Nation and the United States (pro- [fol. 4] claimed June 2, 1806, 7 Stat. 96, 2 Kapp. 85), provided as follows:

"It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Ocumlgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonably signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the terms of the ten succeeding years,

making in the whole, eighteen payments in the course of eighteen years, without interest. The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocumlgee fields."

That said treaty became effective on June 2, 1806. That although the total obligation of the United States under said Article III was $206,000.00, the defendant disbursed $169,452.25 only on said treaty obligation, and therefore the amount of $36,547.75 is due and owing to plaintiff for defendant's failure to fulfill said treaty obligation.

VI.

That Article XIII of the Treaty of March 24, 1832, between the United States and the Creek Nation (proclaimed [fol. 5] April 4, 1832, 7 Stat. 366, 2 Kapp. 341), provided in part as follows:

" • • • Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. • • • "

That said treaty was obligatory upon the parties from April 4, 1832. That although the total obligation of the United States under said above provision of Article XIII was $60,000.00, the defendant disbursed $49,938.99 only on said treaty obligation, and therefore the amount of $10,-061.01 is now due and owing to plaintiff from defendant for defendant's failure to fulfill said treaty obligation.

VII.

That Article V of the Treaty of February 14, 1833, between the United States and the Creek Nation (proclaimed April 12, 1834, 7 Stat. 417, 2 Kapp. 388), provided in part as follows:

"As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present

amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thou- [fol. 6] sand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians:"

That said treaty was obligatory on the parties from April 12, 1834. That although the total obligation of the United States under the above provisions of Article V was acknowledged by defendant to be $2,710 annually, making a total obligation of $119,240.00 over the period 1834 to 1878, the defendant disbursed $74,290.45 only on said treaty obligation for blacksmiths, etc., and education, and therefore the amount of $44,949.55 is now due and owing to plaintiff from defendant for defendant's failure to fulfill said treaty obligation.

VIII.

That Article VI of the Treaty of August 7, 1856, between the United States and the Creek Nation (ratified August 16, 1856, proclaimed August 28, 1856, 11 Stat. 699, 2 Kapp. 756), provided in part as follows:

"In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand

dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * * * "

That said treaty became obligatory upon the parties thereto from August 7, 1856. That although Congress an- [fol. 7] nually appropriated the $10,000 interest due on said $200,000 fund from 1857 to 1861, both inclusive, or a total of $50,000, yet defendant disbursed $21,000.00 only during said period under this treaty obligation, and therefore the amount of $29,000.00 is due and owing to plaintiff from defendant for defendant's failure to fulfill said treaty obligation for said period 1857 to 1861.

Wherefore, plaintiff prays:

1. That plaintiff be awarded judgment against defendant for the total amounts of said unfulfilled treaty obligations, together with interest at five per centum per annum on said amounts to date.

2. And for such other further relief as to the Commission may seem just and proper.

Respectfully submitted,

The Creek Nation, Plaintiff, By Paul M. Niebell, Its Attorney of Record.

[fol. 8] [File endorsement omitted]

BEFORE THE INDIAN CLAIMS COMMISSION

No. 292

THE CREEK NATION, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant.

ANSWER—Filed July 12, 1957

Comes now the defendant by its Assistant Attorney General and for its answer to the petition herein alleges:

First Defense

1. The petition does not state a claim against the United States and in favor of petitioner upon which relief can be granted.

2. The claims set forth herein are *res judicata* by reason of the special jurisdictional Act of Congress approved May 24, 1924 (43 Stat. 139), modified by joint resolution of May 19, 1926 (44 Stat. 568) and the Act of Congress approved February 19, 1929 (45 Stat. 1229) and the cases entitled *The Creek Nation* v. *United States* in the United States Court of Claims and reported in 78 Ct. Cls. 474; 63 Ct. Cls. 270, cert. denied 274 U.S. 751; 77 Ct. Cls. 159, 295 U.S. 103; 84 Ct. Cls. 12, 302 U.S. 620; 87 Ct. Cls. 280; 92 Ct. Cls. 269, cert. denied 313 U.S. 581; 92 Ct. Cls. 346, cert. denied 314 U.S. 667; 93 Ct. Cls. 1; 93 Ct. Cls. 559, 97 Ct. Cls. 602, 97 Ct. Cls. 736, cert. denied 318 U.S. 787; 93 Ct. Cls. 561 and 97 Ct. Cls. 591, 318 U.S. 629.

[fol. 9] Second Defense

3. Defendant admits the allegations of paragraph 1 of the petition.

4. Defendant admits the allegations of paragraph II of the petition.

5. Answering paragraph III of the petition defendant admits that the Creek Nation was the owner of certain funds but denies that all of said funds represented considerations given by the United States for cessions of lands; admits that certain funds and affairs of the Creek Nation have been held and supervised by the defendant for certain purposes and as set forth in various treaties between the Creek Nation and the defendant; alleges that all of said funds were paid, administered and disposed of for the use and benefit of plaintiff, and in fulfillment of the stipulations of the treaties referred to by plaintiff.

6. Answering generally paragraphs IV, V, VI, VII, and VIII of the petition, defendant admits that the treaty articles referred to in said paragraphs contain the portions therein attributed to said treaties by plaintiff; denies that the total obligation of the defendant, as alleged in each of said paragraphs, is correctly set forth in each of said paragraphs; denies that the amount disbursed by defendant is correctly set forth in each of said paragraphs and denies that there is due and owing to plaintiff from defendant the amounts alleged to be unpaid in each of said paragraphs; specifically denies that defendant has acknowledged, or is bound by any acknowledgment, that the annual obligation of the defendant in Article V of the Treaty of February 14, 1833 (7 Stat. 417) was $2,710.00 annually as alleged in para-
[fol. 10] graph VII of the petition; and alleges that plaintiff has received from persons authorized by plaintiff to pay the same the value in money, goods, services or other means of fulfillment, of the treaty stipulations set forth in paragraph IV (Treaty of 1802), paragraph V (Treaty of 1805), paragraph VI (Treaty of 1832), paragraph VII (Treaty of 1833), and paragraph VIII (Treaty of 1856), and that defendant is not indebted to plaintiff in any amount whatsoever.

Third Defense

7. As a further affirmative defense to the petition of the plaintiff, and in particular to paragraphs IV (Treaty

of 1802) and VII (Treaty of 1833) of the petition, defendant alleges that on August 9, 1951, the plaintiff herein filed an action before the Indian Claims Commission, as authorized to do pursuant to that Act of Congress approved August 13, 1946 (60 Stat. 1049; 25 U.S.C. 70), the same being action No. 274 of said Commission, entitled, "*The Creek Nation, plaintiff* v. *The United States, defendant*", and that said action is now pending before said Commission.

8. By said Action No. 274 the plaintiff seeks to recover certain sums of money for annuities allegedly not paid plaintiff by defendant during the period 1862 to 1867, said annuities alleged by the plaintiff to be due and payable annually as set forth in Article V of the Treaty of August 7, 1856, being stipulations reserved and continued from the treaties of 1802 and 1833.

9. On August 10, 1951, plaintiff filed the present action seeking to recover, also for the period of 1862 to 1867, the [fol. 11] value of the same annuities under the Treaties of 1802 and 1833 as in action No. 274.

10. A prior action is pending between plaintiff and defendant herein respecting the issues herein arising out of the annuities of the treaty of 1802 (paragraph IV) and the treaty of 1833 (paragraph VII) and plaintiff should be required to elect in which action the same shall be determined.

Fourth Defense

11. As a further affirmative defense to the allegations of paragraph IV (Treaty of 1802), paragraph V (Treaty of 1805), paragraph VI (Treaty of 1832), and paragraph VII (Treaty of 1833) of the petition, defendant alleges that plaintiff and defendant entered into a treaty on August 7, 1856, ratified August 16, 1856, proclaimed August 28, 1856 (11 Stat. 699, 2 Kapp. 756) which superseded all former treaties between plaintiff and the United States and which fully released and discharged all claims of the plaintiff Creek Nation, or any individuals thereof, against the United States except those claims and demands specifically reserved to plaintiff by said treaty of August 7, 1856.

12. In the Treaty of August 7, 1856, plaintiff did not reserve any claims, demands or rights growing out of the Treaty of 1805 or the claim set forth in paragraph V of the petition; that said Treaty of 1805 became wholly superseded and any claims and demands thereunder became fully released and discharged and plaintiff is not now entitled to any sums, claims or rights, or the enforcement of the same, if the same existed on August 7, 1856.

13. By the Treaty of August 7, 1856, plaintiff reserved its right to future payment and fulfillment of the stipula- [fol. 12] tion to pay $3,000.00 annually by the United States to plaintiff as set forth in Article II of the Treaty of 1802 and paragraph IV of the petition but did not reserve any rights to arrearages or unpaid annual installments or any rights under the other stipulations of said Article II of the Treaty of 1802 and paragraph IV of the petition; that by the provisions of the Treaty of 1856 plaintiff fully released and discharged defendant from obligation to pay any sums which petitioner might be entitled to receive on August 7, 1856, in fulfillment of the stipulations of Article II of the Treaty of 1802.

14. By the Treaty of August 7, 1856, plaintiff reserved certain rights growing out of the Treaty of March 24, 1832, but did not reserve any rights or claims respecting the stipulation contained in Article XIII of said treaty requiring the annual payment of $3,000.00 for twenty years for education (paragraph VI of petition), or for any arrearages thereof due, unpaid and existing on August 7, 1856; that, if any said arrearages existed on said date, the payment of the same, or the right to payment of the same, was released and discharged by the Treaty of August 7, 1856, and defendant is not now liable therefor.

15. By the Treaty of August 7, 1856, plaintiff reserved its right and claim to future and continued payment of $1,000.00 annually for education, services of blacksmith, wheelwright, shops, tools, iron and steel as stipulated in Article V of the Treaty of February 14, 1833, and as set forth in paragraph VII of the petition but did not reserve any right or claim to any sums unpaid or to the value of

services not performed prior to August 7, 1856, and thereby [fol. 13] fully released and discharged defendant from any obligation or liability if any existed at said date.

Fifth Defense

16. For an affirmative defense to the allegations of paragraph IV (Treaty of 1802), paragraph V (Treaty of 1805), paragraph VI (Treaty of 1832), paragraph VII (Treaty of 1833), and paragraph VIII (Treaty of 1856) of the petition defendant alleges that on July 10, 1861, petitioner entered into a treaty with the Confederate States of America (Stat. at Large, Provisional Government of the Confederate States of America, pages 289-303) wherein petitioner withdrew and revoked its allegiance to the United States, disregarded, set aside and abrogated its treaty relations and obligations with the United States, and thereafter engaged in hostilities and warfare with defendant and incurred forfeiture of its property and rights owned by virtue of existing treaties with defendant. Defendant alleges that any rights of petitioner to funds, money, property, services, or other things of value, growing out of the treaty stipulations set forth in paragraphs IV, V, VI, VI, (sic) and VIII of the petition were abrogated, forfeited, suspended, waived, or relinquished on July 10, 1861, by the acts of the plaintiff; that there are no sums due or owing from defendant to plaintiff for rights, claims, or demands existing on July 10, 1861, arising out of treaties in force on said date.

Sixth Defense

17. As a further affirmative defense to the petition of plaintiff, defendant alleges that prior to the Civil War certain funds and annuities, more particularly described in Articles V and VI of the Treaty of August 7, 1856, were [fol. 14] set up under the provisions of that treaty and the several treaties between plaintiff and defendant the fulfillment of which constituted an obligation of defendant to plaintiff.

On July 10, 1861, the plaintiff entered into a treaty with the Confederate States of America (Statutes at Large,

Provisional Government of Confederate States, 289-303), whereby plaintiff threw off its allegiance to the United States, renounced its treaty relations with the United States, and abrogated, cancelled and relinquished all its rights, property and annuities owned by virtue of its several treaties with the United States.

As a result of such action on the part of the plaintiff the relationship between plaintiff and defendant ceased until the execution and ratification of the Treaty of June 16, 1866 (14 Stat. 785); nevertheless, monies in the amounts set forth in the Treaty of 1856 for the services and annuities set forth in said treaty were duly appropriated through the fiscal year 1866, and the Congress adopted measures through which the plaintiff Creek Nation was justly deprived of any sums due it during the years 1862 to 1866, inclusive, under the Treaty of August 7, 1856, and said monies were diverted to the benefit of loyal refugee Indians.

As a result of hostile acts of the plaintiff, Congress enacted the Resolution of February 22, 1862 (12 Stat. 614), which provides:

> "That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions [fol. 15] of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere."

Congress also enacted the Act of July 5, 1862 (12 Stat. 512, 526), which provides:

> "That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Seminoles, Wichitas, and —

other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: Provided, further, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government."

In each of the Acts of Congress of March 3, 1863 (12 Stat. 774, 777), June 25, 1864 (13 Stat. 511, 514), and March 3, 1865 (13 Stat. 541, 544), monies were appropriated for said annuities and services provided by the Treaty of August 7, 1856, and the treaties set forth therein; in each of said acts, the Secretary of the Interior was authorized to expend the amounts therein appropriated for the relief of loyal refugee Indians.

[fol. 16] Pursuant to said Acts of Congress, the sums annually appropriated during the years 1862 to 1866, inclusive, were disbursed and expended, with other funds appropriated for other hostile tribes, for the relief of refugee Indians, including members of the Creek Nation loyal to the defendant.

Defendant further alleges that said disbursements were lawfully and justly made and that the withholding from the plaintiff Creek Nation of said appropriated funds during the years 1862 to 1866, inclusive, was just, proper and legal; that the use and expenditure of said monies for the benefit of refugee Indians was settled, ratified and confirmed by the plaintiff under the Treaty of June 14, 1866 (14 Stat. 785).

Seventh Defense

18. Defendant, while at all times denying that the plaintiff is entitled to any recovery, alleges that, if any sums should be found due the petitioner, plaintiff is not entitled to interest thereon.

Eighth Defense

19. The United States has, from time to time, although under no obligation to do so, expended on petitioner and for petitioner's benefit, large sums of money out of gratuity appropriations, the exact amount of which is unknown to defendant at this time; and if it should be determined that defendant is liable to plaintiff in any amount, defendant is entitled to the allowance of said expenditures out of said gratuity appropriations as an offset and said expenditures will be set out by an amendment hereto under Rule 12. [fol. 17] Wherefore, having fully answered the petition of the plaintiff, defendant prays that the petition be dismissed and that plaintiff recover nothing from the defendant.

Perry W. Morton, Assistant Attorney General.

Keith Browne, Attorney, 218 Federation Bldg., Department of Justice, Washington 25, D. C.

Certificate of Service (omitted in printing).

[fol. 18]

EXCERPTS FROM DEFENDANT'S EXHIBIT No. 142

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON

The Honorable Jun 28, 1932

The Attorney General.

Sir:

Transmitted herewith is a report, in duplicate, of disbursements made by the United States for the benefit of the Creek Nation of Indians.

This report has been complied in response to your request for this information in connection with the petition of the Creek Nation of Indians, No. H-510, filed in the Court of Claims, November 28, 1927.

Respectfully,

(Signed) J. R. McCARL
Comptroller General
of the United States.

Inclosure.

[fol. 19]

GENERAL ACCOUNTING OFFICE

WASHINGTON

The following report of the General Accounting Office "In re: Petition of the Creek Nation of Indians, Court of Claims No. H-510," consisting of 744 pages exclusive of the unnumbered pages on which appear the opening statement and the "Table of Contents," was prepared in the Indian Tribal Claims Section of the Claims Division of the General Accounting Office under the supervision of E. B. Smith.

Chief of Section, and David Neumann, Chief of Division. The information and data contained therein which were compiled from the records of the General Accounting Office, and supplemented by certain information obtained from the sources referred to in the report, to wit, the annual reports, ledgers, etc., of the Office of Indian Affairs, are believed to be true and accurate in all respects and are hereby so certified under the seal of the General Accounting Office on this 28th day of June, 1932.

(Signed) E. B. Smith,
Chief, Indian Tribal Claims Section

(Signed) David Neumann,
Chief, Claims Division

(Signed) J. R. McCarl,
Comptroller General of the United States

[fol. 20] INTRODUCTORY

The petition of the Creek Nation of Indians, No. H-510, was filed in the Court of Claims of the United States on November 28, 1927.

This suit was instituted by virtue of the act of May 24, 1924, 43 Stat. 139, as modified by joint resolution of May 19, 1926, 44 Stat. 568. Said act of May 24, 1924, reads in part as follows:

> " • • • That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their

merits by the Court of Claims or the Supreme Court of the United States: * * *.

* * * * * * *

"SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estopped, but may be pleaded as an offset in such suit."

The aforesaid joint resolution reads in part as follows:

"* * * That * * * the Act of Congress approved May 24, 1924, entitled 'An Act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, [fol. 21] and enter judgment in any claims which the Creek Indians may have against the United States, and for other purposes'; * * * shall be construed to permit each Indian nation or tribe mentioned in said Acts of Congress to prosecute its claims in a single suit or to bring a separate suit on one or more claims as its attorney or attorneys may elect: * * *."

The claims of plaintiff arise principally from transactions in connection with and pursuant to the Treaty of March 24, 1832, 7 Stat. 366, and the act of June 28, 1898, 30 Stat. 495. However, in order to show the extent to which the United States has fulfilled its financial obligations to plaintiff under treaties, agreements, and acts of Congress, an accounting under all such treaties, agreements, and acts with the exceptions stated on pages 94 to 96, is incorporated in this report.

The amounts available for disbursement under certain appropriations and funds were increased by miscellaneous receipts derived from the sales of property and from insurance received for loss of goods, and by transfers and other items, which items appear in the disbursing officers' accounts. The amount of said items applicable to a particular appropriation or fund is set up as a separate item on the

balanced statements of said appropriations and funds. (See pages 110, 512, 514, 626, 635, 643, and 646.)

The accounting features of this report are divided into two parts, designated as follows:

[fol. 22] "Part I. Summary of disbursements made by the United States for the benefit of the Creek Nation of Indians, during the period from August 7, 1790, to June 30, 1929.

"Part III. Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to and in connection with various treaties, agreements, and acts of Congress, during the period from August 7, 1790, to June 30, 1929.

[fol. 23]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

PART I

This part covers pages 4 to 6 and contains a summary of the disbursements made by the United States for the benefit of the Creek Nation of Indians during the period from August 7, 1790, to June 30, 1929, as set out on the abstracts of disbursements and disbursement schedules in Part III, pages 90 to 689.

This summary shows the amounts disbursed for the benefit of the Creek Nation of Indians and for their benefit jointly with other Indians pursuant to and in connection with various treaties, agreements, and acts of Congress.

[fol. 24] Summary of disbursements made by the United States for the benefit of the Creek Nation of Indians during the period from August 7, 1790, to June 30, 1929.

Disbursements for the benefit of the Creek Nation of Indians.

Pursuant to and in connection with:

Treaty of August 7, 1790	(a)	$ 126,000.00	
Treaty of June 16, 1802	(b)	232,690.25	
Treaty of November 14, 1805	(c)	175,323.23	
Treaty of August 9, 1814	(d)	23,325.80	
Treaty of January 22, 1818	(e)	125,285.58	
Treaty of January 8, 1821	(f)	586,055.91	
Treaty of February 12, 1825	(g)	55,909.23	
Treaty of January 24, 1826	(h)	2,220,547.89	
Treaty of November 15, 1827	(i)	41,621.00	
Treaty of March 24, 1832	(j)	3,564,787.83	
Treaty of February 14, 1833	(k)	84,529.03	
Treaty of November 23, 1838, and Supplementary Treaty of June 13, 1854	(l)	723,116.68	
Treaty of January 4, 1845	(m)	110,791.33	
Treaty of August 7, 1856	(n)	1,185,786.78	
Treaty of June 14, 1866	(o)	1,815,124.41	
Agreement of January 19, 1889, ratified by the act of March 1, 1889	(p)	6,159,159.32	
Agreement of September 27, 1897, ratified by the act of June 28, 1898, as modified and amended by the Agreement of March 8, 1900, ratified by the act of March 1, 1901, the Supplemental Agreement ratified by the act of June 30, 1902, and the act of April 26, 1906	(q)	3,089,184.58	$20,319,238.85

From money appropriated to fulfill various treaties with said Indians during the period from July 1, 1898, to June 30, 1929	(r)	212,093.60
For purposes stipulated in various treaties with said Indians	(s)	49,546.15
Carried forward		$20,580,878.60

(For notes (a) to (s), see next page.)

[fol. 25]

Brought forward		$20,580,878.60
Disbursements for the benefit of the Creek Nation of Indians jointly with other Indians.		
Pursuant to and in connection with:		
Treaty of August 7, 1856	(t)	27,211.96
Treaty of June 14, 1866	(u)	5,573.24
		$20,613,663.80

Note: Certain other disbursements were made for the benefit of the Creek Nation of Indians and are discussed in this report, but, for the reasons given on pages 114 and 115, 287 and 288, and 543 to 545, said disbursements have not been included in this summary.

(a) See page 109, Item (a); also page 116, Item (b).
(b) See page 134, Item (b); also page 135, Item (b).
(c) See page 146, Item (a); also page 147, Item (a).
(d) See page 154, Item (a); also page 155, Item (a).
(e) See page 163, Item (a); also page 164, Item (a).
(f) See page 177, Item (a); also page 181, Item (d).
(g) See page 194, Item (a); also page 195, Item (a).
(h) See page 208, Item (b); also page 209, Item (b).
(i) See page 267, Item (a); also page 268, Item (a).
(j) See page 299, Item (b); also page 307, Item (i).
(k) See page 379, Item (a); also page 380, Item (b).
(l) See page 405, Item (a); also page 409, Item (e).
(m) See page 426, Item (a); also page 428, Item (e).
(n) See page 446, Item (a); also page 449, Item (e).
(o) See page 480, Item (a); also page 486, Item (f).
(p) See page 511, Item (a); also page 517, Item (d).
(q) See page 625, Item (a); also page 648, Item (g).
(r) See page 676, Item (a); also page 677, Item (a).
(s) See page 683, Item (a); also page 684, Item (a).
(t) See page 446, Item (b); also page 449, Item (d).
(u) See page 480, Item (b); also page 486, Item (g).

[fol. 26]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 15

[Handwritten notation—Extract from General Accounting Office Report—Ct. Cls. Case No. H-510—Filed August 10, 1932—Gen. Doc. No. 61, p. 213]

PART III

SECTION A

This section covers pages 97 to 120 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of August 7, 1790, 7 Stat. 35.

[fol. 27] The first appropriation made by Congress that can be identified as applicable to the aforesaid Treaty of August 7, 1790, was carried in the act of June 12, 1798, 1 Stat. 564, where, among various appropriations made for the Indian Department, is set out the following item:

> "For the payment of annuities to the Six Nations, Chickasaws, Cherokees and Creeks, the sum of fourteen thousand dollars."

The act of February 25, 1799, 1 Stat. 618, authorized annual appropriations for carrying into effect the aforesaid Treaty of August 7, 1790, to be appropriated so long as said treaty should be in force. Said act reads in part as follows:

> "* * * That for the purpose of defraying the expenses which may arise in carrying into effect the following treaties, viz.: A treaty made and concluded with the Creeks at the city of New York, on the seventh day of April [August], one thousand seven hundred and ninety, * * * The money arising under the revenue laws of the United States, which have been heretofore passed and not already appropriated to any other purpose, that is to say, so much thereof as may be necessary, be, and is hereby pledged and appropriated for the payment of the annuities stipulated as aforesaid, to be paid to the said Indian tribes or nations, and to

continue so pledged and appropriated so long as the said treaties and agreement shall be in force."

Pursuant to the foregoing act, there was appropriated for the years 1799 to 1831 an annual amount of $1,500, and by the appropriation acts of June 4, 1832, 4 Stat. 527; February 20, 1833, 4 Stat. 617; June 26, 1834, 4 Stat. 683; [fol. 28] March 3, 1835, 4 Stat. 783; and June 14, 1836, 5 Stat. 44, annual appropriations of $1,500 were made for the annuity payment stipulated in the aforesaid Treaty of August 7, 1790.

The amounts appropriated by the aforesaid acts were set up and carried on the books of the United States Treasury under various headings; however, due to the fact that it was found impracticable to separate the disbursements under said appropriations in accordance with the changes occurring in the title thereof, the title "Annuities to Creek Indians" is used in this report. Attention is also invited to the fact that the aforesaid appropriation acts included treaty moneys applicable to several tribes of Indians; however, the said appropriation title "Annuities to Creek Indians" used in this section, includes only that portion of the moneys appropriated which was applicable to the Creek Nation of Indians under the aforesaid Treaty of August 7, 1790.

Appropriations made pursuant to the aforesaid treaty during the years 1837 to 1902 were set up and carried on the books of the United States Treasury under the heading "Fulfilling Treaties with Creeks" and "Fulfilling Treaties with Various Indian Tribes." However, disbursements for the fiscal years 1899 to 1902 have not been included in this section, but are included in Section S, pages 671 to 680, for reasons stated therein.

The act of May 27, 1902, 32 Stat. 249, provided that there be placed upon the books of the United States Treasury, [fol. 29] to the credit of the Creek Nation of Indians, the sum of $999,368, being in full for all the permanent annuities guaranteed the said nation by various treaties, including the permanent annuity of $1,500 guaranteed said nation by the aforesaid Treaty of August 7, 1790. Accordingly, the amount of $999,368 was set up on the books of the United States Treasury to the credit of said nation under

"Creek General Fund," by Appropriation Warrant No. 8, dated July 1, 1962. Details in connection with said fund are set out in Section Q, pages 507 to 536.

In connection with the annuities due the Creek Nation of Indians under the aforesaid Treaty of August 7, 1790, it may be stated that while a careful search of the records of the General Accounting Office failed to disclose the amounts disbursed in the purchase of annuity goods for the Creek Indians during the years 1790 to 1809, said search did disclose that some annuity goods were furnished said Indians during said period. An examination of the ledgers and journals of the office of the Accountant for the War Department, the records of the storekeeper at Philadelphia (now on file in the General Accounting Office), and various records found with the old miscellaneous papers on file in the Office of Indian Affairs, indicates that goods valued at $1,500.11 were shipped from Philadelphia to the Creek country, on May 20, 1797, and that goods valued at $1,500 [fol. 30] and $1,499.02 were actually delivered to the Creek Nation of Indians during the years 1798 and 1799, respectively. Said examination also discloses that goods of the following values were forwarded from Philadelphia for the Creek Indians during the following years:

Year	Value of goods	Remarks
1800	$1,500.34	Annuity for year 1800
1803	3,000.00	Annuities for Creeks
1803	1,008.08	Goods for Creek chiefs
1804	4,150.84	Annuities for Creeks
1804	1,100.07	Goods for Creek chiefs
1805	4,000.24	Annuities for Creeks
1805	500.16	Goods for Creek chiefs
1805	4,000.00	Annuity for year 1805
1806	6,000.50	Annuity for year 1806
1806	6,673.85	Annuity for year 1806
1807	1,000.08	Goods for Upper Creek chiefs
1807	499.05	Goods for Lower Creek chiefs
1807	6,025.06	Annuity for Upper Creeks
1807	5,999.39	Annuity for Lower Creeks
1808	7,646.46	Annuity for Upper Creeks
1808	8,250.45	Annuity for Lower Creeks
1808	501.38	Goods for Lower Creek chiefs

Year	Value of goods	Remarks
1808	499.90	Goods for Upper Creek chiefs
1809	500.41	Goods for Upper Creek chiefs
1809	348.98	Goods for Lower Creek chiefs
1809	7,300.40	Annuity for Upper Creeks
1809	7,749.64	Annuity for Lower Creeks
1809	508.51	Annuity for year 1809

Said examination also discloses that moneys were advanced to disbursing officers for payment of salaries of interpreters for the Upper and Lower Creeks. During the years 1790 to 1809, various amounts were advanced to disbursing officers for annuities, but due to the fact that in most instances the names of the tribes for which the annuities were intended are not set out, it is impossible to state what portion, if any, of the amounts set out in the foregoing tabula- [fol. 31] tion were in fulfillment of the aforesaid Treaty of August 7, 1790. It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty.

The moneys appropriated and disbursed to fulfill the stipulations of the aforesaid Treaty of August 7, 1790, during the years 1810 to 1902, have been set out in this report on regular disbursement schedules and statements, $126,000 of which is set out on Statement No. 2, page 109, and the remainder is included in the amounts set out on Statements Nos. 4 and 59, pages 114 and 676, respectively.

Due to the incompleteness of the ledger accounts covering the period prior to the year 1837, and the fact that the annuities forwarded to the Creek Nation of Indians, as outlined on pages 102 and 103, can not be definitely identified with a particular treaty and appropriation, it has been found impracticable to set out statements disclosing disposition of moneys appropriated to fulfill the aforesaid Treaty of August 7, 1790, prior to the year 1837. However, there is set out on pages 110 to 113 a balanced statement of the appropriation "Fulfilling Treaties with Creeks," setting out the amounts appropriated for various treaties

[fol. 32] with the Creek Nation of Indians, and set up under said heading during the years 1837 to 1902, together with other amounts increasing the amount available for disbursement, and the disposition of said amounts. Due to the fact that various treaties with the Creek Nation of Indians provided for the same objects during the same periods, and the money appropriated to fulfill one treaty was advanced to disbursing officers with money appropriated to fulfill other treaties, it was found impracticable to set out a balanced statement of moneys appropriated for each treaty separately. With reference to the amount of $343,501.17 set out as Item (cc) in said statement, and which was disbursed for the relief of refugee Indians during the years 1862 to 1867, attention is invited to Statement No. 4, pages 114 and 115, wherein the distribution of the money disbursed is set out.

Attention is further invited to the act of July 5, 1862, 12 Stat. 528, wherein, among other things, is set out the following with reference to the method of disbursing treaty appropriations applicable to certain tribes of Indians during the period immediately subsequent to said date:

> "* * * That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the [fol. 33] President: *Provided, further*, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government."

Similar provisions with regard to relief of refugee Indians were contained in the acts of March 3, 1863, 12 Stat. 793; June 25, 1864, 13 Stat. 180; and March 3, 1865, 13 Stat. 652.

The greater portion of the disbursements made for the relief of refugee Indians was made by W. G. Coffin, Superintendent of Indian Affairs in charge of the Southern Superintendency, and his successor, Elijah Sells. Said refugee Indians were located at various camps and agencies within the states of Kansas and Oklahoma, and the surrounding territory. An examination of the records of the General Accounting Office covering the years 1862 to 1867, discloses that, with few exceptions, the disbursements made during said period under the appropriation "Fulfilling Treaties with Creeks" were made for the relief of refugee Indians of various tribes, as set out on Statement No. 4, pages 114 and 115. Appropriations made to fulfill treaties with other tribes, as well as tribal funds and general appropriations, were similarly used for the relief of said refugee Indians, but no attempt has been made in this report to set out the amounts disbursed for the Creek [fol. 34] Nation of Indians from treaty appropriations for other tribes, general appropriations, or funds, other than those belonging to the Creek Nation of Indians. (For disbursements from "Interest on Creek Orphan Fund", see pages 287 and 288.)

With reference to note (cc) of the aforesaid statement, attention is invited to the fact that all balances unaccounted for occurred in fiscal officers' accounts prior to the year 1856, excepting the balance of $8,334.74 due from George W. Ingalls, which sum represents a part of the amount of $10,000 appropriated to fulfill the provisions of Article 9, Treaty of June 14, 1866, 14 Stat. 785. (See Settlement No. 5020-1881, accounts of George W. Ingalls.)

With reference to the amounts returned to the surplus fund as set out in note (gg) of the aforesaid statement, the amount of $150,432.26 consists mainly of balances of amounts appropriated for removals, pursuant to the Treaty of March 24, 1832, 7 Stat. 366. The amount of $50,000 was a part of the money appropriated to fulfill the unratified

Treaty of September 3, 1863. The items of $10,300 and $100 consist of $10,000 appropriated for agency buildings pursuant to Article 9 of the Treaty of June 14, 1866, 14 Stat. 785, and $400 appropriated for the purchase of iron, steel, etc., pursuant to the Treaty of February 14, 1833, 7 Stat. 417. The items of $9,817.04 and $1 consist of $7,662.93 of the amount appropriated for transportation of articles pur- [fol. 35] chased pursuant to said Treaty of June 14, 1866; $25.92 of the amount appropriated for agricultural operations pursuant to the Treaty of January 24, 1826, 7 Stat. 286; $74.17 of an amount of $4,000 appropriated for the removal of refugee Creeks to the Creek reservation; $100 of the amounts appropriated for the purchase of iron, steel, etc., pursuant to said Treaty of February 14, 1833; $10.38 of the amount of $100,000 appropriated for soldiers, refugees and freedmen pursuant to Article 3 of said Treaty of June 14, 1866; and $1,944.64 of the amount appropriated for taking a census pursuant to Article 4 of the said Treaty of June 14, 1866. The item of $116.89 consists of $100 of the amount of $2,810 appropriated by the act of March 3, 1875, 18 Stat. 448, for educational purposes, and $16.89 of the amount appropriated for surveying pursuant to Article 8 of the said Treaty of June 14, 1866. The amount of $9,447.52 consists of a part of $33,758.40 appropriated by the act of August 19, 1890, 26 Stat. 340, as interest on $675,168, at 5 per cent per annum, pursuant to the said Treaty of June 14, 1866, said amount of $9,447.52 being the interest on $400,000 from January 11, 1891, to June 30, 1891, the $400,000 having been appropriated by said act of August 19, 1890, and paid to the Creek Nation of Indians in January and February, 1891. The amount of $2,475 returned to the surplus fund on June 30, 1900, is fully discussed on pages 86 and 87.

[fol. 36]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 15

STATEMENT NO. 2

Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of August 7, 1790, 7 Stat. 35.

Article 4

Annuity, cash	$ 76,500.00
Cash payments to Creek Treasurer	49,500.00
	(a)$126,000.00

(a) See page 116, Item (b); also page 5, Item (a). For yearly disbursements by appropriations, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Schedules Nos. 1, 2, and 3, pages 117 to 120.

[fol. 37]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

STATEMENT NO. 3

Statement disclosing disposition of moneys available pursuant to various treaties, agreements, and acts of Congress under the appropriation:

"Fulfilling Treaties with Creeks"

		(b)	(c)
Appropriated by Congress pursuant to the following treaties:			
Treaty of Aug. 7, 1790	(a)	$ 96,000.00	
Treaty of June 16, 1802	(b)	192,000.00	
Treaty of Jan. 24, 1826	(c)	1,459,270.00	
Treaty of Mar. 24, 1832	(d)	1,328,771.00	
Treaty of Feb. 14, 1833	(e)	165,600.00	
Treaty of Nov. 23, 1838	(f)	227,500.00	
Treaty of Jan. 14, 1845	(g)	96,000.00	
Treaty of Aug. 7, 1856	(h)	1,275,166.66	
Treaty of Sept. 3, 1863	(i)	150,000.00	
Treaty of June 14, 1866	(j)	1,464,396.65	
Appropriated by Congress for miscellaneous purposes	(k)	13,928.87	
Miscellaneous receipts	(l)	13,749.65	
Transferred from:			
"Carrying into Effect Treaties with Creeks"	(m)	38,603.33	
"Treaty with Western Creeks"	(n)	914.50	
"Building at Agencies and Repairs"	(o)	2,000.00	
Error in accounts of Lieut. Edward Deas	(p)	.01	
Amount improperly passed to credit of agent	(q)	.40	
Error in transfer of moneys from E. Rector to W. H. Garrett	(r)	.80	
Carried forward		$6,464,501.87	

(For notes (a) to (r), see pages 111 and 112.)

[fol. 38]

STATEMENT NO. 3 (Continued)

	Dr.		Cr.
Brought forward	$6,464,501.87		
Disbursements for the benefit of the Creek Nation of Indians pursuant to the following treaties:			
Treaty of Aug. 7, 1790		(s)	$ 82,500.00
Treaty of June 16, 1802		(t)	165,000.00
Treaty of Jan. 24, 1826		(u)	1,253,064.11
Treaty of Mar. 24, 1832		(v)	1,136,820.38
Treaty of Feb. 14, 1833		(w)	69,649.10
Treaty of Nov. 23, 1838		(x)	277,478.62
Treaty of Jan. 14, 1845		(y)	77,422.51
Treaty of Aug. 7, 1856		(z)	1,165,064.78
Treaty of June 14, 1866		(aa)	1,409,581.52
Disbursements for the benefit of the Creek Nation of Indians for miscellaneous purposes		(bb)	212,093.60
Disbursements for relief of refugee Indians		(cc)	343,501.17
Disbursements for the benefit of other Indians		(dd)	464.54
Balance unaccounted for		(ee)	36,306.06
Compromise settlement L. N. Robinson		(ff)	2,865.77
Returned to surplus		(gg)	232,689.71
	$6,464,501.87		$6,464,501.87

(a) See page 706, Item (a).
(b) See page 708, Item (a).
(c) See page 710, Item (a).
(d) See page 711, Item (a).
(e) See page 712, Item (a).
(f) See page 712, Item (b).
(g) See page 713, Item (a).
(h) See page 714, Item (a).
(i) See page 715, Item (a).
(j) See page 716, Item (a).
(k) See page 716, Item (e).

(For notes (1) to (gg), see following pages 112 and 113.)

[fol. 39]

STATEMENT NO. 3 (Continued)

(l)	Received from the following sources:	
	Sale of tribal property	$ 10.50
	Sale of Creek lands by S. D. Graham; see Settlement No. 2102-1838, accounts of Crawford and Balch	1,500.00
	Sale of property of Creek Indians in the Cherokee Nation (owners unidentified); See Settlement No. 5997-1848, and Indian Office Files, P-646, Creek (Emigration)	750.00
	Insurance on Creek annuity goods damaged and lost in transit on Steamer "Jefferson"; see Indian Office Files, G-18, Creek	954.00
	Sale of Government property	479.25
	Sale of blankets, shawls, etc.; see page 402	6,959.69
	Insurance received for loss of Creek goods; see page 402	3,061.21
	Sale of house	35.00
		$13,749.65

(m) See Settlement No. 5107-1840, accounts of Wm. Armstrong, and Settlement No. 8164-1840, accounts of James Logan.

(n) See Settlement No. 3261-1839, accounts of Jacob Brown, and Settlement No. 6000-1841, accounts of Daniel Kurtz.

(o) See Settlement No. 4947-1840, accounts of James Logan, and Settlement No. 5107-1840, accounts of Wm. Armstrong.

(p) Error in bringing forward balance in Settlement No. 3655-1839, to Settlement No. 3670-1839.

(q) See Settlement No. 3605-1846, accounts of Wm. Armstrong.

(r) An examination of the records of the General Accounting Office discloses that Agent W. H. Garrett received $0.80 from Supt. Elias Rector, but reference to the accounts of said Elias Rector fails to disclose the transfer of said amount.

(s) See Disbursement Schedule No. 2, pages 118 and 119; also page 116, Item (a).

(t) See Disbursement Schedule No. 6, pages 138 and 139; also page 135, Item (a).

(u) See Disbursement Schedule No. 28, pages 225 to 244; also page 209, Item (a).

(v) See Disbursement Schedule No. 53, pages 318 to 329; also page 306, Item (b).

(For notes (w) to (gg), see next page.)

[fol. 40]

STATEMENT NO. 3 (Continued)

(w) See Disbursement Schedule No. 76, pages 383 to 394; also page 380, Item (a).

(x) See Disbursement Schedule No. 80, pages 411 to 416; also page 409, Item (a).

(y) See Disbursement Schedule No. 86, pages 430 to 434; also page 428, Item (b).

(z) See Disbursement Schedule No. 88, pages 450 to 462; also page 449, Item (a).

(aa) See Disbursement Schedule No. 91, pages 487 to 499; also page 486, Item (a).

(bb) See Disbursement Schedule No. 105, pages 678 to 680; also page 677, Item (a).

(cc) See Statement No. 4, pages 114 and 115; also pages 105 to 107.

(dd) Amount of $464.54 disbursed in 1868 for the following purposes:

Expenses of transporting Seneca and Shawnee annuities	$125.00
Expenses of transporting Osage annuity	109.59
Expenses of transporting Cherokee moneys	229.95
	$464.54

(ee) Balances unaccounted for by the following fiscal officers:

Phillip H. Raiford	$ 635.65
James R. Stephenson	486.57
R.D.C. Collins	25,333.16
James S. Dawson	1,515.94
Geo. W. Ingalls	8,334.74
	$36,306.06

(ff) Amount due from L. N. Robinson, Supt. of Indian Affairs and not recovered; said amount was appropriated by act of February 1, 1888, 25 Stat. 13, and is included in amount of $13,928.87 set out as Item (k), page 110; see also page 495.

(gg) Surplus warrants:

Dated June 30, 1870	$150,442.26
No. 424, dated June 30, 1870	50,000.00
No. 531, dated June 29, 1872	10,300.00
No. 586, dated June 30, 1873	100.00
No. 658, dated June 30, 1875	9,817.04
No. 691, dated June 30, 1876	116.89
No. 732, dated June 30, 1877	1.00
No. 43, dated June 30, 1891	9,447.52
No. 43, dated June 30, 1900	2,475.00
	$232,689.71

[fol. 41]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

STATEMENT NO. 4

Statement setting out the various amounts disbursed by the United States, during the years 1862 to 1867, for the relief of refugee Indians, under the appropriation "Fulfilling Treaties with Creeks."

Year	Indians benefited		Amount
1862	Creeks	$ 274.46	
	Creeks, Cherokee, Seminole and other Indians	39,981.64	
	Southern refugee Indians	17,706.99	
	Tribes not designated	694.80	
			$ 58,657.89
1863	Southern refugee Indians	$42,413.80	
	Wichitas	20.00	
			42,433.80
1864	Creeks	$ 151.17	
	Creeks, Cherokee, Seminole and other Indians	4,273.40	
	Southern refugee Indians	54,419.95	
	Seminoles	28.75	
	Cherokees and other refugee Indians	1,250.18	
	Osages	387.00	
	Creeks and Chickasaws	12.50	
	Tribes not designated	521.03	
			61,043.98
1865	Southern refugee Indians	$ 629.85	
	Creeks and Seminoles	30.00	
	Creeks	84.77	
	Destitute Indians at Cherokee Agency	39,878.90	
	Refugee Indians on Ottawa Reservation	52.10	
	Tribes not designated	55.91	
			40,731.53

Year	Indians benefited		Amount
1866	Destitute Indians at Cherokee Agency	$136,388.20	
	Choctaws and Chickasaws	395.30	
	Choctaws	26.01	
	Choctaws, Chickasaws and Cherokees	48.89	
	Tribes not designated	3,595.57	
			140,453.97
	Carried forward		$343,321.17

[fol. 42]

STATEMENT NO. 4 (Continued)

Brought forward		$343,321.17
1867	Tribe not designated	180.00
Total		$343,501.17

Recapitulation

Creeks	$ 510.40
Southern refugee Indians	115,170.59
Wichitas	20.00
Seminoles	28.75
Cherokee and other refugee Indians	1,250.18
Osages	387.00
Creeks and Seminoles	30.00
Destitute Indians at Cherokee Agency	176,267.10
Refugee Indians on Ottawa Reservation	52.10
Choctaws and Chickasaws	395.30
Choctaws	26.01
Choctaws, Chickasaws and Cherokees	48.89
Creeks and Chickasaws	12.50
Creek, Cherokee, Seminole and other Indians	44,255.04
Tribes not designated	5,047.31
	(a)$343,501.17

(a) See page 111, Item (cc).

[fol. 43]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 15

ABSTRACT NO. 1

Abstract of disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of August 7, 1790, 7 Stat. 35.

Schedule No.	Name of appropriation	Amount disbursed
1	Annuities to Creek Indians	$40,500.00
2	Fulfilling Treaties with Creeks	(a) 82,500.00
3	Fulfilling Treaties with Various Indian Tribes	3,000.00
Total		(b)$126,000.00

(a) See page 111, Item (8).
(b) See page 109, Item (a); also page 5, Item (a).

[fol. 44]

DISBURSEMENT SCHEDULE NO. 1

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Annuities to Creek Indians"(a)

Calendar year	Treaty of August 7, 1790, 7 Stat. 35 Article 4 Annuity, cash
1811	$1,500.00
1815	7,500.00
1818	4,500.00
1819	1,500.00
1820	1,500.00
1821	1,500.00
1822	1,500.00
1823	1,500.00
1824	1,500.00
1825	1,500.00
1826	1,500.00
1827	(b) 1,500.00
1828	1,500.00
1829	1,500.00
1830	1,500.00
1831	1,500.00
1832	1,500.00
1833	1,500.00
1834	1,500.00
1835	1,500.00
1836	1,500.00
Total	$40,500.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 696.

(b) Annuity diverted to pay property damage sustained by Gen. McIntosh and party.

[fol. 45]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 15

DISBURSEMENT SCHEDULE NO. 2

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Creeks"(a)

Calendar year	Treaty of August 7, 1790, 7 Stat. 35 Article 4		Total
	Annuity, cash	Cash payments to Creek Treasurer	
1837	$3,000.00		$3,000.00
1839	1,500.00		1,500.00
1840	1,500.00		1,500.00
1841	1,500.00		1,500.00
1843	1,500.00		1,500.00
Fiscal year			
1846	1,500.00		1,500.00
1847	1,500.00		1,500.00
1848	1,500.00		1,500.00
1849	1,500.00		1,500.00
1850	1,500.00		1,500.00
1851	1,500.00		1,500.00
1852	1,500.00		1,500.00
1853	1,500.00		1,500.00
1854	1,500.00		1,500.00
1855	1,500.00		1,500.00
1856	1,500.00		1,500.00
1857	1,500.00		1,500.00
1858	1,500.00		1,500.00
1859	1,500.00		1,500.00
1860	3,000.00		3,000.00
1861		$1,500.00	1,500.00
1868		1,500.00	1,500.00
1869		1,500.00	1,500.00
1870		3,000.00	3,000.00
Carried forward	$33,000.00	$7,500.00	$40,500.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 705.

[fol. 46]

DISBURSEMENT SCHEDULE NO. 2 (Continued)

Fiscal year	Treaty of August 7, 1790, 7 Stat. 35 Article 4		Total
	Annuity, cash	Cash payments to Creek Treasurer	
Brought forward	$33,000.00	$7,500.00	$40,500.00
1871		1,500.00	1,500.00
1872		1,500.00	1,500.00
1873		1,500.00	1,500.00
1874		1,500.00	1,500.00
1875		1,500.00	1,500.00
1876		1,500.00	1,500.00
1877		1,500.00	1,500.00
1878		1,500.00	1,500.00
1879		1,500.00	1,500.00
1880		1,500.00	1,500.00
1881		1,500.00	1,500.00
1882		1,500.00	1,500.00
1883		1,500.00	1,500.00
1884		1,500.00	1,500.00
1885		1,500.00	1,500.00
1886		1,500.00	1,500.00
1887		1,500.00	1,500.00
1888		1,500.00	1,500.00
1889		1,500.00	1,500.00
1890		1,500.00	1,500.00
1891		1,500.00	1,500.00
1892		1,500.00	1,500.00
1893		1,500.00	1,500.00
1894		1,500.00	1,500.00
1895		1,500.00	1,500.00
1896		1,500.00	1,500.00
1897		1,500.00	1,500.00
1898		1,500.00	1,500.00
Total	$33,000.00	$49,500.00	$82,500.00

[fol. 47]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 15

DISBURSEMENT SCHEDULE NO. 3

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Various Indian Tribes"(a)

Fiscal year	Treaty of August 7, 1790, 7 Stat. 35 Article 4 Annuity, cash
1844	$1,500.00
1845	1,500.00
Total	$3,000.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 717.

[fol. 48]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 15

SECTION B

PART III

This section covers pages 121 to 126, and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of June 29, 1796, 7 Stat. 56.

* * * * * * *

[fol. 49] A careful search of the records of the General Accounting Office fails to disclose the amount disbursed for the survey of the boundaries referred to in Articles 2, 3, 4, and 5 of the aforesaid treaty. However, an examination of the journals and ledgers of the Office of the Accountant for the War Department (now on file in the General Accounting Office) discloses that the following warrants were issued for the payment of expenses in con-
[fol. 50] nection with the survey of said boundary lines:

Warrant No.	Year	Amount
2262	1797	$ 637.00
2307	1797	522.83
2348	1797	1,793.96
2431	1797	2,165.53
2589	1797	2,000.00
2657	1797	332.00
		$7,451.32

Said search also fails to disclose the amount disbursed in fulfillment of Article 8 of the said treaty. However, an examination of the journals, ledgers, and warrant books of the Office of the Accountant for the War Department, the records of the storekeeper at Philadelphia (now on file in the General Accounting Office), and various records found with the old miscellaneous papers on file in the Office of Indians Affairs, indicates that goods, provisions, etc., valued at $2,335.72, were furnished the Creek Nation of Indians during the years 1796 and 1797. Said examination also discloses that moneys were advanced to disbursing officers, during the years subsequent to 1797, for the purchase of goods and provisions for the Creek Nation and for the pay of blacksmiths; however, due to the incompleteness of the records covering the early period, said examination fails to disclose the amount or variety of goods and provisions actually purchased for said Indians, or the extent of blacksmiths' services furnished them, pursuant to the aforesaid Treaty of June 29, 1796.

[fol. 51]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

PART III

SECTION C

This section covers pages 127 to 140 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of June 16, 1802, 7 Stat. 68.

* * * * * * *

[fol. 52] The first disbursements which can be identified as having been made pursuant to the foregoing treaty were made during the years 1805 to 1811, inclusive, under the appropriation "Indian Department." The sum of $3,990.25 was identified as having been disbursed pursuant to said treaty during said years, of which $3,290.25 was in pay-
[fol. 53] ment of claims arising from depredations committed by Creek Indians and $700 was in cash payments to the chiefs of the Creek Nation. (See Disbursement Schedule No. 4, page 136.) Due to the incompleteness of the records covering said years, it cannot be definitely stated that said sum is the total disbursed pursuant to said treaty for said years.

By the act of February 15, 1819, 3 Stat. 481, $3,000 was appropriated for the payment of the annuity due the Creek Nation of Indians under the aforesaid Treaty of June 16, 1802. Said act, in so far as it pertains to the Creek Nation of Indians, reads as follows:

> "For annuity to Creek nation, under the treaty of one thousand eight hundred and two, three thousand dollars."

By the act of March 3, 1819, 3 Stat. 519, the annual sum of $3,000 was appropriated for the payment of the annuity due the Creek Nation of Indians under the aforesaid Treaty of June 16, 1802. That part of said act which pertains to said annuity reads as follows:

> "SEC. 6. *And be it further enacted*, That for the payment of the annuity granted to the Creek nation of

> Indians, by the treaty concluded near Fort Wilkinson, on the Oconee, the sixteenth of June, one thousand eight hundred and two, and for which no appropriation has heretofore been made, the annual sum of three thousand dollars be, and the same is hereby, appropriated; * * * "

Pursuant to the aforesaid acts of February 15, 1819, [fol. 54] and March 3, 1819, $6,000 was set up on the books of the United States Treasury for the year 1819 for the payment of annuities due the Creek Nation of Indians under the aforesaid Treaty of June 16, 1802. Thereafter, for the years 1820 to 1831, $3,000 was set up annually for said purpose pursuant to said act of March 3, 1819. Beginning with the year 1832, and continuing through the year 1836, the amounts appropriated for the payment of the annuity due under said Treaty of June 16, 1802, were included in the annual amount appropriated to pay all annuities due under all the then existing treaties with the Creek Nation of Indians.

The amounts appropriated as aforesaid were set up and carried on the books of the United States Treasury under various headings; however, due to the fact that it was found impracticable to separate the disbursements under said appropriations in accordance with the changes occurring in the titles thereof, the title "Annuities to Creek Indians" is used in this report. Attention is invited to the fact that the aforesaid appropriation acts included treaty moneys applicable to several tribes of Indians; however, the said appropriation title "Annuities to Creek Indians" used in this section, includes only the moneys appropriated which were applicable to the aforesaid Treaty of June 16, 1802.

Appropriations made pursuant to the aforesaid treaty during the years 1837 to 1902, were set up and carried on [fol. 55] the books of the United States Treasury under the heading "Fulfilling Treaties with Creeks," with the exception of the amounts appropriated for the years 1843 and 1844, which were set up and carried under the heading "Fulfilling Treaties with Various Indian Tribes."

Of the amount disbursed as annuities under the aforesaid Treaty of June 16, 1802, $127,500 was paid the Creek Nation

in cash during the years 1819 to 1860, $99,000 was paid in cash to the Treasurer of the Creek Nation during the years 1868 to 1898, and $2,200 was disbursed for support of Creek children at the Choctaw Academy in the year 1831. (See page 134.)

The money appropriated to fulfill the various treaties with the Creek Nation of Indians during the years 1862 to 1867, including the money appropriated to fulfill the aforesaid Treaty of June 16, 1802, was disbursed, with few exceptions, for the relief of refugee Indians, and is set out in Statement No. 4, pages 114 and 115. Disbursements of moneys appropriated to fulfill said treaties for the fiscal years 1899 to 1902 are set out on pages 672 to 680, for reasons stated therein.

For reasons stated on pages 104 and 105, balanced statements of moneys appropriated to fulfill the aforesaid Treaty of June 16, 1802, prior to 1837 have not been set out in this report; however, there is set out on pages 110 to 113 a statement disclosing the disposition of the moneys appropriated [fol. 56] pursuant to the various treaties with the Creek Nation of Indians subsequent to 1837, which were set up and carried under the heading "Fulfilling Treaties with Creeks."

[fol. 57]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

STATEMENT NO. 5

Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of June 16, 1802, 7 Stat. 68.

Article 2

Depredations		$ 3,290.25
Cash payments to chiefs		700.00
Annuity, cash		127,500.00
Cash payments to Creek Treasurer		99,000.00
Support of Creek children at Choctaw Academy	(a)	2,200.00
	(b)	$232,690.25

(a) See note (b), page 137.

(b) See page 135, Item (b); also page 5, Item (b). For yearly disbursements by appropriations, setting out purpose of disbursements and amounts disbursed therefore, see Disbursement Schedules Nos. 4 to 7, pages 136 to 140.

[fol. 58]

ABSTRACT No. 2

Abstract of disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of June 16, 1802, 7 Stat. 68.

Schedule No.	Name of appropriation	Amount disbursed
4	Indian Department	$ 3,990.25
5	Annuities to Creek Indians	57,700.00
6	Fulfilling Treaties with Creeks	(a) 165,000.00
7	Fulfilling Treaties with Various Indian Tribes	6,000.00
Total		(b) $232,690.25

(a) See page 111, Item (t).

(b) See page 134, Item (b); also page 5, Item (b).

[fol. 59]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 4

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Indian Department"(a)

	Treaty of June 16, 1802, 7 Stat. 68 Article 2		
Calendar year	Depredations	Cash payment to chiefs	Total
1805		$500.00	$ 500.00
1806	$1,145.00		1,145.00
1807	763.75		763.75
1808	149.00		149.00
1809	1,010.00		1,010.00
1810	150.00		150.00
1811	72.50	200.00	272.50
Total	$3,290.25	$700.00	$3,990.25

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 718.

[fol. 60]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 5

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Annuities to Creek Indians"(a)

	Treaty of June 16, 1802 7 Stat. 68 Article 2		
Calendar year	Support of Creek children at Choctaw Academy	Annuity, cash	Total
1819		$6,000.00	$6,000.00
1820		3,000.00	3,000.00
1821		3,000.00	3,000.00
1822		3,000.00	3,000.00
1823		3,000.00	3,000.00
1824		3,000.00	3,000.00
1825		3,000.00	3,000.00
1826		3,000.00	3,000.00
1827		3,000.00	3,000.00
1828		3,000.00	3,000.00
1829		3,000.00	3,000.00
1830		3,000.00	3,000.00
1831	(b)$2,200.00	552.57	2,752.57
1832		3,000.00	3,000.00
1833		3,000.00	3,000.00
1834		3,947.43	3,947.43
1835		3,000.00	3,000.00
1836		3,000.00	3,000.00
Total	$2,200.00	$55,500.00	$57,700.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 697.

(b) The expenditure of $2,200 for the support of Greek children at Choctaw Academy during the year 1831 was made with the consent of the head chiefs of the Creek Nation. (See Settlement No. 15851, 1831, accounts of Thomas Henderson.)

[fol. 61]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 6

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Creeks"(a)

	Treaty of June 16, 1802, 7 Stat. 68 Article 2		
Calendar year	Annuity, cash	Cash payments to Creek Treasurer	Total
1837	$6,000.00		$6,000.00
1839	3,000.00		3,000.00
1840	3,000.00		3,000.00
1841	3,000.00		3,000.00
1843	3,000.00		3,000.00
Fiscal year			
1846	3,000.00		3,000.00
1847	3,000.00		3,000.00
1848	3,000.00		3,000.00
1849	3,000.00		3,000.00
1850	3,000.00		3,000.00
1851	3,000.00		3,000.00
1852	3,000.00		3,000.00
1853	3,000.00		3,000.00
1854	3,000.00		3,000.00
1855	3,000.00		3,000.00
1856	3,000.00		3,000.00
1857	3,000.00		3,000.00
1858	3,000.00		3,000.00
1859	3,000.00		3,000.00
1860	6,000.00		6,000.00
1861		$3,000.00	3,000.00
1868		3,000.00	3,000.00
1869		3,000.00	3,000.00
Carried forward	$66,000.00	$9,000.00	$75,000.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 707.

[fol. 62]

DISBURSEMENT SCHEDULE NO. 6 (Continued)

Fiscal year	Treaty of June 16, 1802, 7 Stat. 68 Article 2		Total
	Annuity, cash	Cash payments to Creek Treasurer	
Brought forward	$66,000.00	$9,000.00	$75,000.00
1870		6,000.00	6,000.00
1871		3,000.00	3,000.00
1872		3,000.00	3,000.00
1873		3,000.00	3,000.00
1874		3,000.00	3,000.00
1875		3,000.00	3,000.00
1876		3,000.00	3,000.00
1877		3,000.00	3,000.00
1878		3,000.00	3,000.00
1879		3,000.00	3,000.00
1880		3,000.00	3,000.00
1881		3,000.00	3,000.00
1882		3,000.00	3,000.00
1883		3,000.00	3,000.00
1884		3,000.00	3,000.00
1885		3,000.00	3,000.00
1886		3,000.00	3,000.00
1887		3,000.00	3,000.00
1888		3,000.00	3,000.00
1889		3,000.00	3,000.00
1890		3,000.00	3,000.00
1891		3,000.00	3,000.00
1892		3,000.00	3,000.00
1893		3,000.00	3,000.00
1894		3,000.00	3,000.00
1895		3,000.00	3,000.00
1896		3,000.00	3,000.00
1897		3,000.00	3,000.00
1898		3,000.00	3,000.00
Total	$66,000.00	$99,000.00	$165,000.00

[fol. 63]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 7

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Various Indian Tribes"(a)

Fiscal year	Treaty of June 16, 1802, 7 Stat. 68 Article 2 Annuity, cash
1844	$3,000.00
1845	3,000.00
Total	$6,000.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 717.

[fol. 64]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

PART III

SECTION D

This section covers pages 141 to 149 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of November 14, 1805, 7 Stat. 96.

* * * * * * *

[fol. 65] "ART. IV. And it is hereby further agreed, on the part of the United States, that in lieu of all former stipulations relating to blacksmiths, they will furnish the Creek nation for eight years, with two blacksmiths and two strikers."

By the act of April 21, 1806, 2 Stat. 407, Congress appropriated a total of $206,000 to fulfill the stipulations of Article 3 of the aforesaid treaty, said act reading in this particular as follows:

> " • • • That for the purpose of carrying into effect a convention between the United States and the Creek nation of Indians, concluded at the city of Washington, on the fourteenth day of November, one thousand eight hundred and five, a sum of twelve thousand dollars, annually, for eight years, and the sum of eleven thousand dollars, annually, for the term of ten years, next thereafter succeeding, be, and the same are hereby appropriated."

The annual installments appropriated as aforesaid were set up and carried on the books of the United States Treasury under various headings; however, due to the fact that it was found impracticable to separate the disbursements under said appropriations in accordance with the changes occurring in the titles thereof, the title "Annuities to Creek Indians" is used in this report.

An examination of the records of the General Accounting Office discloses that the sum of $206,000, appropriated as aforesaid, was advanced to various disbursing officers, together with moneys appropriated to fulfill treaties with Indians other than the Creek Nation, and that $169,452.25 [fol. 66] thereof was disbursed for the benefit of the Creek Nation of Indians. (See page 148.) However, due to the incompleteness of the records covering the period during which the aforesaid Treaty of November 14, 1805, was in effect, and to the fact that the annuities forwarded to the Creek Nation of Indians, as outlined on pages 102 to 104, cannot be definitely identified with a particular treaty, it has not been possible to show the final disposition of the remainder of said advances.

With reference to the stipulations contained in Article 4 of the Treaty of November 14, 1805, aforesaid, which were abrogated by Article 3 of the Treaty of January 22, 1818, 7 Stat. 171, an examination of the records of the General Accounting Office discloses that the sum of $5,870.98 was disbursed under the appropriation "Indian Department" during the years 1806 to 1815 for the pay of blacksmiths and strikers. (See page 149.) However, due to the incompleteness of said records covering the early period, it cannot be definitely stated that said amount is the total disbursed for blacksmiths and strikers furnished the Creek Nation during said period.

[fol. 67]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

STATEMENT NO. 6

Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of November 14, 1805, 7 Stat. 96.

Article 3	
Annuity, cash	$128,667.45
Annuity, goods	40,784.80
Article 4	
Pay of blacksmiths and strikers	5,870.98
	(a)$175,323.23

(a) See page 147, Item (a); also page 5, Item (c). For yearly disbursements by appropriations, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Schedules Nos. 8 and 9, pages 148 and 149.

[fol. 68]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

ABSTRACT NO. 3

Abstract of disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of November 14, 1805, 7 Stat. 96.

Schedule No.	Name of appropriation	Amount disbursed
8	Annuities to Creek Indians	$169,452.25
9	Indian Department	5,870.98
Total		(a)$175,323.23

(a) See page 146, Item (a); also page 5, Item (c).

[fol. 69]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 8

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Annuities to Creek Indians"(a)

Calendar year	Treaty of November 14, 1805, 7 Stat. 96 Article 3 Annuity		
	Cash	Goods	Total
1811	$ 6,667.45	$ 5,332.55	$ 12,000.00
1815	12,000.00	35,452.25	47,452.25
1817	5,000.00		5,000.00
1818	50,000.00		50,000.00
1819	11,000.00		11,000.00
1820	11,000.00		11,000.00
1821	11,000.00		11,000.00
1822	11,000.00		11,000.00
1823	11,000.00		11,000.00
Total	$128,667.45	$40,784.80	$169,452.25

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 698.

[fol. 70]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 9

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Indian Department"(a)

Calendar year	Treaty of November 14, 1805, 7 Stat. 96 Article 4 Pay of blacksmiths and strikers
1806	$ 282.24
1807	557.04
1809	317.60
1810	626.80
1811	938.70
1812	1,259.20
1813	944.40
1814	629.80
1815	315.20
Total	$5,870.98

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 718.

[fol. 71]

EXCERPT FROM DEFENDANT'S EXHIBIT NO. 185

PART III

SECTION F

This section covers pages 158 to 166 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of January 22, 1818, 7 Stat. 171.

[fol. 72]

DISBURSEMENT SCHEDULE NO. 12

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Annuities to Creek Indians" (a)

Calendar year		Treaty of January 22, 1818, 7 Stat. 171 Article 2 Annuity, cash
1818		$20,000.00
1819		10,000.00
1820		10,000.00
1821		10,000.00
1822		10,000.00
1823		10,000.00
1824		10,000.00
1825		10,000.00
1826		10,000.00
1827	(b)	10,000.00
1828		10,000.00
Total		$120,000.00

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 696.

(b) Annuity diverted to pay damage sustained by Gen. McIntosh and party.

[fol. 73]

EXCERPT FROM DEFENDANT'S EXHIBIT NO. 142

Due to the incompleteness of the ledger accounts covering the period prior to 1837, it has been found impracticable to set out balanced statements of all appropriations under which disbursements pursuant to the aforesaid treaty were made; however, there is set out on pages 110 to 113 a statement disclosing the disposition of the moneys appropriated pursuant to the various treaties with the Creek Nation of Indians subsequent to 1837, which were set up and carried under the heading "Fulfilling Treaties with Creeks."

[fol. 74]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

PART III

SECTION K

This section covers pages 272 to 370 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of March 24, 1832, 7 Stat. 366.

[fol. 75]

Excerpt From Claimant's Exhibit No. 1

STATEMENT NO. 24

Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of March 24, 1832, 7 Stat. 366, and the act of August 7, 1882, 22 Stat. 301.

Article 2		
Cash payments to Creek orphans	$259,306.50	
Cash payments to Creek Treasurer	83.65	
Education	59,131.77	
Expenses of taking census	3,235.00	
Locating Creek reservations	15,425.87	
Miscellaneous agency expenses	.96	
Pay of miscellaneous employees	492.74	
Payments to individuals for reservations	122,405.50	
Purpose not shown	1,700.00	
		$461,781.99
Article 3		
Expenses of investigating fraud in the sale of Creek reservations	$ 41,102.20	
Expenses of certifying sale of Creek reservations	9,043.94	
		50,146.14
Article 5		
Expenses of removing intruders		5,085.56
Article 8		
Annuity, cash	$200,660.00	
Depredations	5,100.00	
Expenses of delegations	1,700.00	
		207,460.00
Article 9		
Payment of debts and relief of Creeks		99,960.01
Carried forward		$824,433.70

[fol. 76]

STATEMENT NO. 24 (Continued)

Brought forward			$ 821,433.70
Article 10			
Expenses of delegations			16,000.00
Article 11			
Annuities, cash:			
Tuske-hem-haw-Cusetaw	$462.00		
Blind Ucher King	800.00		
Neah Micco	800.00	$ 2,062.00	
Payment of judgment against chiefs		8,303.36	
Payment to self-emigrating Creek Indians		1,275.00	
Payment of losses for which the Creek Nation claim the United States responsible		7,698.90	
Payment of losses in prevention of emigration		2,940.70	
Payment of improvements under the Treaty of January 24, 1826		1,000.00	23,279.96
Article 12			
Provisions		$1,015,683.88	
Removal of Indians		1,105,148.41	
Payment to self-emigrating Creek Indians		(a) 4,620.00	2,125,452.29
Carried forward			$2,969,165.95

(a) See page 327, note (a).

[fol. 77]

STATEMENT NO. 24 (Continued)

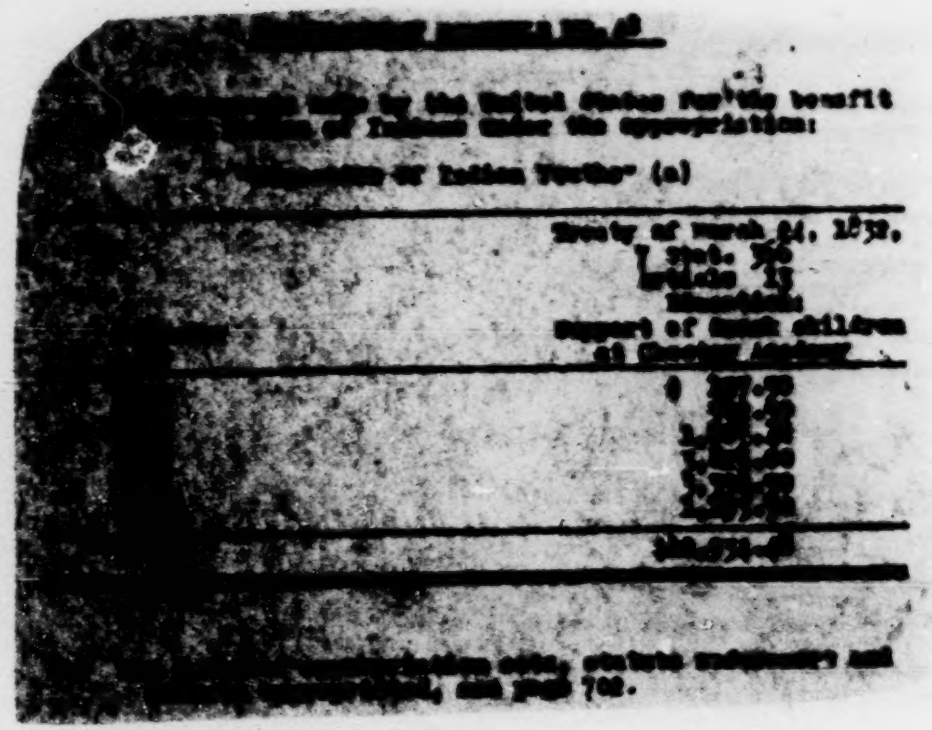
Brought forward			$2,989,165.95
Article 13			
Pay of blacksmith and striker	$ 34,839.64		
Iron, etc., for blacksmith shops	9,048.86		
Education	49,938.99		
Rifles	87,568.74		
Blankets	4,065.25		
Rifles, blankets, etc.	46,918.90		
Ammunition	556.75		
		(a)	232,936.93
Article 14			
Salary and expenses of commissioner in providing for exchange of lands and removal west			1,184.00
Miscellaneous items			
Feed and care of livestock	$ 810.00		
Miscellaneous agency expenses	1,778.78		
			2,588.78
Treaty of March 24, 1832, 7 Stat. 366, and act of August 7, 1882, 22 Stat. 301			
Cash payments to Creek orphans and their heirs	$304,630.48		
Special attorneys' fees and expenses	33,890.59		
Cash payments to Creek Treasurer	391.10		
			338,912.17
Total		(b)	$3,564,787.93

(a) Includes purchase of 7,307 rifles and 6,694 blankets.
(b) See page 307, Item (i); also page 5, Item (j). For yearly disbursements by appropriations, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Schedules Nos. 41 to 74, pages 308 to 370.

[fol. 78]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

313



DISBURSEMENT SCHEDULE NO. 53 (Continued)

Treaty of March 24, 1832, 7 Stat. 366	Calendar year 1837	1838	1839
Brought forward	$ 31,642.20	$ 11,092.30	$ 11,906.75
Article 12			
Provisions	408,562.15	53,158.43	102,922.10
Removal of Indians:			
Transportation and subsistence		133,944.71	
Transportation	21,560.24	6,638.67	1,737.09
Miscellaneous expenses	3,558.50	3,524.63	135.35
Pay of conductors and other employees	11,702.87	1,103.60	
Fuel and light	26.00		
Medical attention	3,145.98	17.00	383.82
Feed and care of livestock	751.26		
Advertising	231.87		
Clothing		8,321.48	
Demurrage		27,300.00	
Care of indigent Indians		1,454.04	
Article 13			
Pay of blacksmith and striker	330.01		990.00
Rifles	4,248.12	59,877.00	8,100.00
Education:			
Support of Creek children at Choctaw Academy	3,281.00	905.00	3,083.74
Total	$489,040.20	$307,336.86	$129,258.85

(Continued on next page)

[fol. 80]

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[redacted] SCHEDULE No. 53 (Continued)

Treaty of March 24, 1832, 7 Stat. 335	Calendar year 1840	1841	1842
Article 3			
Expenses of certifying sale of Creek reservations	$ 18.50		
Article 8			
Annuity, cash	10,000.00	$10,000.00	
Article 12			
Provisions	3,250.33	9,564.60	
Removal of Indians:			
Transportation and subsistence		1,555.50	
Article 13			
Pay of blacksmith and striker	2,170.00	1,[illegible]0.43	$ 420.00
Iron, etc., for blacksmith shops	859.65	3[illegible]3.75	116.00
Education:			
Support of Creek children at Choctaw Academy	2,956.96	1,9[illegible]3.50	1,524.00
Pay of superintendents and teachers			777.11
Furniture and equipment			69.65
Miscellaneous items			
Miscellaneous agency [redacted]		671.87	
[redacted]	$19,[illegible]5.44	$ [illegible]53.5[illegible]	$2,907.35

(Continued on next page)

DISBURSEMENT SCHEDULE NO. 53 (Continued)

Treaty of March 24, 1832, 7 Stat. 366	Calender year 1843	Fiscal year 1844	Fiscal year 1845
Article 8			
Annuity, cash	$10,000.00		
Article 12			
Provisions		$2,849.35	
Removal of Indians:			
Transportation			$186.00
Pay of conductors and other employees			597.75
Article 13			
Pay of blacksmith and striker	1,260.00		120.00
Education:			
Support of Creek children at Choctaw Academy	315.00		847.55
Total	$11,575.00	$2,849.35	$1,751.30

(Continued on next page)

DISBURSEMENT SCHEDULE NO. 53 (Continued)

Treaty of March 24, 1832, 7 Stat. 366	Fiscal year 1846	1847	1848
Article 8			
Annuity, cash	$10,000.00	$10,000.00	$10,000.00
Article 12			
Provisions	1,297.51		
Removal of Indians:			
Transportation	4,882.50		
Miscellaneous expenses	1.39		
Medical attention	600.00		
Advertising	53.00		
Demurrage	125.00		
Article 13			
Pay of blacksmith and striker	1,380.00	1,380.00	1,980.00
Iron, etc., for blacksmith shops		414.00	508.42
Education:			
Pay of superintendents and teachers	157.88	189.73	729.88
Furniture and equipment	4.50		
Pay of miscellaneous employees	12.70	32.38	45.98
Provisions	307.84		
Board and tuition	2,224.87	2,529.00	1,679.80
Medical attention	5.00	12.00	12.00
Support of schools	2.70	.70	
Transportation of pupils			565.00
Total	$21,054.89	$14,557.81	$15,321.08

(Continued on next page)

[fol. 83]

DISBURSEMENT SCHEDULE NO. 53 (Continued)

Treaty of March 24, 1832, 7 Stat. 366	Fiscal year 1849	1850	1851
Article 8			
Annuity, cash	$10,000.00	$10,000.00	$8,300.00
Expenses of delegations		(a)1,700.00	
Article 13			
Pay of blacksmith and striker	1,680.00	1,260.00	840.00
Iron, etc., for blacksmith shops	513.46		256.50
Education:			
Support of Creek children at Choctaw Academy	1,721.10	85.27	
Pay of superintendents and teachers		406.88	331.27
Furniture and equipment		391.51	114.68
Pay of miscellaneous employees		100.00	273.34
Provisions		961.45	1,741.80
Board and tuition		1,562.50	2.31
Medical attention		76.12	
Clothing		796.43	1.25
Transportation of supplies		434.34	47.59
Erection and repair of school buildings		3,647.34	689.37
Livestock		317.00	224.50
School farm		37.25	276.82
Fuel and light			19.24
Feed and care of livestock			15.00
Total	$13,919.56	$22,376.09	$13,827.73

(Continued on next page)

(a) The amount of $1,700, part of the annuity of 1851, was used to defray the expenses of certain delegates representing the Creek Nation, who visited Washington, D. C. on business.
Authority for this expenditure was based on two orders of the Creek Nation, dated December 1, 1849. ($1,100 and $600, respectively.)

[fol. 84]

DISBURSEMENT SCHEDULE NO. 53 (Continued)

Treaty of March 24, 1832, 7 Stat. 366	Fiscal year 1893	Total
Brought forward	$105.00	$984,432.47
Article 13		
Pay of blacksmith and striker		31,179.44
Iron, etc., for blacksmith shops		8,500.00
Education:		
Support of Creek children at Chesterw Academy		1>,>83.12
Pay of superintendents and teachers		2,593.37
Furniture and equipment		580.54
Pay of miscellaneous employees		454.40
Provisions		2,511.15
Board and Tuition		7,998.48
Medical attention		165.12
Support of schools		3.40
Transportation of pupils		525.00
Clothing		791.38
Transportation of supplies		1,081.93
Erection and repair of school buildings		4,35>.71
Livestock		541.50
School farm		908.67
Fuel and light		19.24
Feed and care of livestock		15.00
Rifles	(a)	72,275.12
Miscellaneous item		
Miscellaneous agency [illegible]		1,478.76
Total	$105.00	1,13>,820.38

(a) Purchase of 5,425 rifles.

[fol 85]

EXCERPT FROM CLAIMANT'S EXHIBIT NO 1

DISBURSEMENT SHEET NO. 56

Disbursements made by the United States for the benefit of the Creek Nation of Indians from:

"Interest on Creek Orphan Fund" (a)

Treaty of March 24, 1832, 7 Stat. 366	Fiscal year 1847	1848	1852
Article 2			
Cash payments to Creek orphans	$6,630.00	$1,390.75	
Education:			
Furniture and equipment			246.04
Pay of superintendents and teachers			1,415.76
Pay of miscellaneous employees			450.00
Board and tuition			5.77
Total	$6,630.00	$1,398.75	$2,117.57

(Continued on next page)

(a) For numbers, dates and amounts of warrants crediting interest, see page 738.

[Col 96]

DISBURSEMENT SCHEDULE NO. 56 (Continued)

Treaty of March 24, 1859, 7 Stat. 966	Fiscal year 1953	1954	1955
Article 2			
Education:			
Furniture and equipment	$ 38.90	$ 859.75	
Pay of superintendents and teachers	2,000.00	3,768.74	3,729.16
Erection and repairs of school buildings	250.00	301.00	1,300.50
Pay of miscellaneous employees		213.75	
Provisions		556.34	
Medical attention		15.00	
School farm		418.54	
Board and tuition		2,000.00	326.91
Total	$2,288.90	$8,133.12	$5,356.57

(Continued on next page)

[fol. 87]

REIMBURSEMENT SCHEDULE NO. 56 (Continued)

Treaty of March 11, 1858, 7 Stat. 586	Fiscal year 1856	1857	1858
Article 2			
Education:			
Furniture and equipment	$ 115.75	$ 163.30	
Pay of superintendents and teachers	6,000.00	6,451.50	$12,196.36
Erection and repairs of school buildings	1,526.00	156.75	
Rent and fuition	575.00	1,316.50	1,600.00
Transportation of pupils	81.50		
Pay of miscellaneous employees		811.00	
Provisions		1,549.96	
School farm		543.14	
Clothing		47.61	
Transportation of supplies		400.24	
Fuel and light		1.00	
Livestock		100.00	
Total	$8,298.25	$11,541.00	$13,796.36

(Continued on next page)

[fol. 88]

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DISBURSEMENT SCHEDULE NO. 56 (Continued

Treaty of March 24, 1832, 7 Stat. 566	Fiscal year 1859	1860	1861
Article 2			
Education:			
Pay of superintendents and teachers	$6,000.00		
Board and tuition	1,600.00		
Miscellaneous agency expenses		$ .96	
Purpose not shown			$1,700.00
Total	$7,600.00	$ .96	$1,700.00

(Continued on next page

[fol. 89]

DISBURSEMENT SCHEDULE NO. 56 (Continued)

Treaty of March 24, 1832, 7 Stat. 366	Fiscal year 1888	Total
Article 2		
Cash payments to Creek orphans	$385.84	102,188.27
Miscellaneous agency expenses		.96
Pay of miscellaneous employees		492.74
Education:		
Furniture and equipment		1,423.74
Pay of superintendents and teachers		41,561.52
Erection and repairs of school buildings		3,534.85
Pay of miscellaneous employees		1,474.75
Provisions		2,106.30
Medical attention		15.00
School farm		961.68
Board and tuition		7,424.18
Transportation of pupils		81.50
Clothing		47.61
Transportation of supplies		400.24
Fuel and light		1.00
Livestock		100.00
Purpose not shown		(a) 1,700.00
Total	$385.84	167,513.74

(a) A careful search of the records of the General Accounting Office fails to disclose the purpose of the disbursement; however, affidavits relating to the Creek Indians [illegible] [illegible]

[fol. 90]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

PART III

SECTION L

This section covers pages 371 to 397 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of February 14, 1833, 7 Stat. 417.

* * * * * * *

[fol. 91] The first disbursement which can be identified as having been made in fulfillment of the stipulations contained in the foregoing treaty were made in 1834, under the appropriation "Treaty with the Western Creeks." (See page 381.)

It was stipulated in Article 5 of the aforesaid treaty, among other things, that the United States should purchase 24 cross-cut saws for the Creek Nation of Indians. An examination of the records of the General Accounting office discloses that 24 cross-cut saws, costing $96, were purchased for said nation in 1835. (See page 382.) Said Article 5 also provided for the erection of four patent railway mills. In the year 1841 a mill costing $600 was purchased for the use of Creek Indians (see page 384), and on December 4, 1852, the chiefs and headmen of the Creek Nation received an amount of $4,000 in cash, to satisfy the claims of the Creek Indians for mills. (See page 388.)

A careful search of the United States Statutes and the records of the General Accounting Office fails to disclose the appropriation of any money to fulfill the aforesaid treaty subsequent to the act of March 3, 1877, 19 Stat. 276, [fol. 92] or any disbursements pursuant to said treaty subsequent to the fiscal year 1878.

During the years 1862 to 1867, money appropriated to fulfill the several treaties with the Creek Nation of Indians was disbursed, with few exceptions, for the relief of refugee Indians. (See page 111, Item [illegible]; also see pages 114 and 115.)

For the reason stated on page 205, no attempt has been made to set out balanced statements of the moneys appropriated to fulfill the aforesaid Treaty of February 14, 1833, prior to 1837. However, there is set out on pages 110 to 113, a balanced statement of the appropriation "Fulfilling Treaties with Creeks," setting out the amounts appropriated to fulfill the various treaties with the Creek Nation of Indians, including the aforesaid Treaty of February 14, 1833, during the years 1837 to 1902, together with other amounts increasing the amount available for disbursements, and the disposition of said amounts.

[fol 93]

Excerpt From Claimant's Exhibit No. 1

STATEMENT NO. 30

Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of February 14, 1833, 7 Stat. 417.

Article 5

Pay of blacksmith	$ 2,234.32
Pay of striker	911.72
Pay of blacksmith and striker	17,890.71
Iron, etc., for blacksmith shops	7,266.53
Pay of wagonmaker	4,702.33
Material for mechanical shop	6.00
Erection of shops	2,000.00
Crosscut saws	96.00
Railway mills	4,600.00
Cash payments to Creek Treasurer	20,460.00
Education:	
Pay of superintendents and teachers	7,278.43
Support of Creek children at Choctaw Academy	1,658.50
Furniture and equipment	162.26
Pay of miscellaneous employees	237.50
Medical attention	9.21
Provisions	302.13
Clothing	801.68
Erection and repair of school buildings	2,059.26
Board and tuition	8,171.31
Transportation of supplies	5.35
Fuel and light	12.50
Traveling expenses of school officials, etc.	81.75
Manual training supplies	33.17

Article 7

Cash payments for 10 years (a) [illegible]

(a) See page 390, item (b), also page [illegible], item (a), for yearly disbursements of annuities and, section 2, purpose of [illegible] to Creeks, treaty of [illegible], and [illegible] dated April 12, 1838, [illegible] March 24, 1871, and March 3, 1871.

[fol. 94]

Excerpt From Claimant's Exhibit No. 1

ABSTRACT NO. 11

Abstract of disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of February 14, 1833, 7 Stat. 417.

Schedule No.	Name of appropriation		Amount disbursed
75	Treaty with the Western Creeks		$ 4,624.08
76	Fulfilling Treaties with Creeks	(a)	69,649.10
77	Fulfilling Treaties with Various Indian Tribes		7,725.21
78	Treaty Stipulations		2,530.64
Total		(b)	$84,529.03

(a) See page 111, Item (w).
(b) See page 379, Item (a); also page 5, Item (A).

[fol. 95]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 75

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Treaty with the Western Creeks" (a)

Treaty of February 14, 1833, 7 Stat. 417	Calendar year 1834	1835	1836
Article 5			
Pay of blacksmith	$160.00		
Pay of striker	80.00	$ 64.55	
Pay of wagonmaker	540.00		
Iron, etc., for blacksmith shops		135.95	
Crosscut saws		96.00	
Article 6			
Cash payment for improvements		3,008.21	$117.8
Total	$780.00	$3,304.71	$117.8

(Continued on next page)

(a) For date of appropriation act, statute reference, and amount appropriated, see page 777.

DISBURSEMENT SCHEDULE NO. 75 (Continued)

Treaty of February 14, 1855, 7 Stat. 427	Calendar year 1857	Total
Article 5		
Pay of blacksmith		160.00
Pay of striker		144.55
Pay of wagonmaker		540.00
Iron, etc., for blacksmith shops		135.05
Crosscut saws	(a)	96.00
Article 6		
Cash payment for improvements	$421.50	3,547.58
Total	$421.50	$4,[illegible].08

(a) Purchase of 24 crosscut saws.

[fol. 97]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 76

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Creeks" (a)

Treaty of February 14, 1833, 7 Stat. 417	Calendar year 1837	1838	1839
Article 5			
Pay of blacksmith and striker		$162.84	$ 997.12
Iron, etc., for blacksmith shops	$ 27.37	37.50	86.37
Pay of wagonmaker	150.00		300.00
Erection of shops			2,000.00
Education:			
Pay of superintendents and teachers	141.75	187.50	787.50
Total	$319.12	$387.84	$4,170.99

(Continued on next page)

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 711.

[fol. 98]

[redacted] SCHEDULE NO. 76 (Continued)

[redacted] January 14, 1933.	Calendar year 1940	1941	1942
[redacted]			
Pay of blacksmith and helper	$840.00	$1,035.75	
Hire, [redacted] for blacksmith		189.62	
Pay of [redacted]	600.00	732.75	$300.00
		600.00	
[redacted]			
Pay of [redacted] and clerking	977.50	1,184.63	
Furniture and equipment	27.75	39.12	
Total	$2,445.25	$3,781.87	$300.00

(Continued on next page)

[fol 99]

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1833, 7 Stat. 417	Calendar year 1843	Fiscal year 1844	Fiscal year 1845
Article 5			
Pay of blacksmith and striker	$840.00		$860.00
Iron, etc., for blacksmith shops			124.75
Education:			
Pay of superintendents and teachers	600.00		301.66
Support of Creek children at Choctaw Academy		$61.79	
Total	$1,440.00	$61.79	$1,286.41

(Continued on next page)

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1855. 7 Stat. 417	Fiscal year 1846	1847	1848
Article 5			
Pay of blacksmith and striker	$840.00	$840.00	$840.00
Iron, etc., for blacksmith shops		207.00	254.22
Education:			
Pay of superintendents and teachers	835.56		
Furniture and equipment	53.62		
Total	$1,729.18	$1,047.00	$1,094.22

(Continued on next page)

[fol. 101]

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1855, 7 Stat. 417	Fiscal year 1849	1850	1851
Article 5			
Pay of blacksmith and striker	$840.00	$840.00	$ 840.00
Iron, etc., for blacksmith shops	259.23		428.25
Education:			
Pay of superintendents and teachers		75.00	
Furniture and equipment		41.79	
Pay of miscellaneous employees		149.06	
Medical attention		9.24	
Provisions		302.13	
Clothing		416.98	
Erection and repair of school buildings		5.80	
Board and tuition			1,000.00
Total	$1,099.23	$1,840.00	$2,268.25

(Continued on next page)

[fol. 102]

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1855, 7 Stat. 417	Fiscal year 1953	1955	1954
Article 5			
Pay of blacksmith and striker	$ 840.00	$ 840.00	$840.00
Iron, etc., for blacksmith shops	29.00	474.25	
Education:			
Pay of superintendents and teachers		437.31	
Pay of miscellaneous employees		88.50	
Clothing		384.70	
Erection and repair of school buildings		5.96	
Board and tuition	1,171.31		
Transportation of supplies		5.36	
Fuel and light		12.60	
Traveling expenses of school officials, etc.		32.00	
Manual training supplies		53.57	
Railway mills		4,000.00	
Total	$2,040.31	$6,314.25	$840.00

(Continued on next page)

[fol 103]

DISBURSEMENT SCHEDULE NO. 16 (Continued)

Treaty of February 14, 1833, 7 Stat. 417	Fiscal year 1855	1856	1857
Article 5			
Pay of blacksmith and striker	$ 840.00	$ 840.00	$1,260.00
Iron, etc., for blacksmith shops	250.00	223.00	412.00
Education: Board and tuition	1,000.00	1,000.00	1,000.00
Pay of wagonmaker			300.00
Total	$2,090.00	$2,063.00	$2,972.00

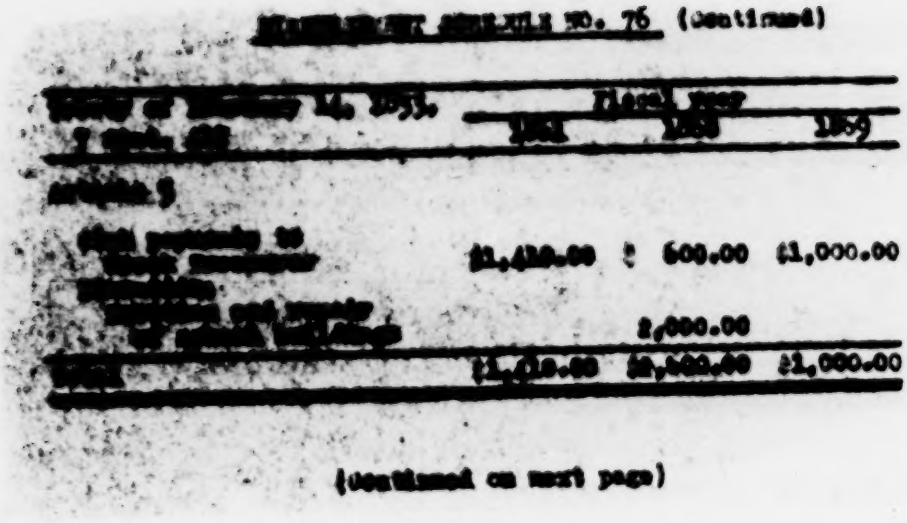
(Continued on next page)

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1833, 7 Stat. 417	Fiscal year 1858	1859	1860
Article 5			
Pay of blacksmith and striker	$ 420.00	$ 840.00	$1,395.00
Iron, etc., for blacksmith shops	435.89	270.00	337.50
Education:			
Board and tuition	1,000.00	1,000.00	1,000.00
Pay of wagonmaker		600.00	300.00
Total	$1,855.89	$2,710.00	$3,032.50

(Continued on next page)

[fol. 105]



[redacted] SCHEDULE NO. 76 (continued)

[redacted]	Fiscal year		
	1961	1960	1959
[redacted]			
[redacted]	£1,400.00	£ 600.00	£1,000.00
[redacted]		2,000.00	
[redacted]	£1,400.00	£2,600.00	£1,000.00

(continued on next page)

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1853, 7 Stat. 417	Fiscal year 1870	1871	1872
Article 5			
Cash payments to Creek Treasurer	$2,710.00	$2,710.00	$2,710.00
Total	$2,710.00	$2,710.00	$2,710.00

(Continued on next page)

[fol 107]

DISBURSEMENT SCHEDULE No. 76 (Continued)

Treaty of February 14, 1833, 7 Stat. 417	Fiscal year 1873	1874	1875
Article 5			
Cash payments to Creek Treasurer	$1,300.00	$1,600.00	$1,000.00
Total	$1,300.00	$1,600.00	$1,000.00

(Continued on next page)

DISBURSEMENT SCHEDULE NO. 76 (Continued)

Treaty of February 14, 1833, 7 Stat. 417	Fiscal year 1877	Fiscal year 1878	Total
Article 5			
Pay of blacksmith and striker			$17,890.71
Iron, etc., for blacksmith shops			4,045.95
Pay of wagonmaker			3,282.75
Erection of shops			2,000.00
Railway mills			4,600.00
Cash payments to Creek Treasurer	$2,710.00	$2,710.00	20,420.00
Education:			
Pay of superintendents and teachers			5,528.41
Support of Creek children at Chesney Academy			61.70
Furniture and equipment			102.26
Pay of miscellaneous employees			257.76
Medical attention			9.24
Provisions			302.13
Clothing			801.66
Erection and repair of school buildings			1,011.76
Board and tuition			8,171.51
Transportation of supplies			5.36
Fuel and light			12.60
Traveling expenses of school officials, etc.			32.00
Manual training supplies			53.57
Total	$2,710.00	$2,710.00	$69,649.10

[fol. 109]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

395

DISBURSEMENT SCHEDULE NO. 77

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Various Indian Tribes" (a)

Treaty of February 14, 1833, 7 Stat. 417	Calendar year 1843	Fiscal year 1844	Fiscal year 1845
Article 5			
Pay of blacksmith		600.00	$300.00
Pay of striker		240.00	120.00
Iron, etc., for blacksmith shops	$640.00	1,094.56	986.50
Education:			
Pay of superintendents and teachers	200.00	1,000.00	550.00
Erection and repair of school buildings		47.50	
Traveling expenses of school officials, etc.		49.75	
Support of Creek children at Choctaw Academy		1,288.59	308.31
Total	$840.00	$4,320.40	$2,264.81

(Continued on next page)

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 717.

DISBURSEMENT SCHEDULE NO. 77 (Continued)

Treaty of February 14, 1833, 7 Stat. 417	Fiscal year 1846	Total
Article 5		
Pay of blacksmith	$300.00	$1,200.00
Pay of striker		300.00
Iron, etc., for blacksmith shops		2,721.06
Education:		
Pay of superintendents and teachers		1,750.00
Erection and repair of school buildings		47.50
Traveling expenses of school officials, etc.		49.75
Support of Creek children at Choctaw Academy		1,596.90
Total	$300.00	$7,725.21

[fol 111]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

DISBURSEMENT SCHEDULE NO. 78

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Treaty Stipulations" (a)

Treaty of February 14, 1833, 7 Stat. 417	Calendar year 1835	1836	Total
Article 5			
Pay of wagonmaker	$279.58	$600.00	$879.58
Pay of blacksmith		874.32	874.32
Pay of striker		407.17	407.17
Iron, etc., for blacksmith shops		363.57	363.57
Material for mechanical shop		6.00	6.00
Total	$279.58	$2,251.06	$2,530.64

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 727.

[fol. 112]

EXCERPT FROM DEFENDANT'S EXHIBIT No. 186

PART III

SECTION N

This section covers pages 422 to 435 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of January 4, 1845. 9 Stat. 821.

[fol. 113]

DISBURSEMENT SCHEDULE NO. 8c (Continued)

Treaty of January 4, 1845, 9 Stat. 821	Fiscal year 1851	1852	1853
Article 4			
Education:			
Erection and repair of school buildings	$ 8[illegible].30		$ [illegible]
Pay of superintendents and teachers	11[illegible].50	$ 380.13	130.31
Furniture and equipment	218.10	139.35	291.77
Pay of miscellaneous employees	382.23	491.07	50.00
Provisions	1,145.3[illegible]	2,009.87	1,372.24
Board and tuition	1,339.04	1,000.00	3,000.00
Medical attention	80.14	188.25	
Clothing	253.45	358.40	372.[illegible]
Transportation of supplies	31.35	534.82	348.[illegible]
Livestock	109.13	92.50	[illegible]
School farm	577.44	243.71	249.95
Fuel and light		13.10	
Traveling expenses of school officials, etc.		12.00	
Manual training supplies			[illegible].41
Total	$[illegible],339.04	$[illegible],000.00	$[illegible],000.14

(Continued on next page)

[fol. 114]

DISBURSEMENT SCHEDULE NO. 8c (Continued)

Treaty of January 4, 1855, 9 Stat. 821	Fiscal year 1854	1855	1856
Article 4			
Education:			
Erection and repair of school buildings	$ 12.[illegible]	$ 20.55	$ 91.14
Pay of superintendents and teachers	39.20	907.31	1,238.01
Furniture and equipment	5.37	234.21	208.9[illegible]
Pay of miscellaneous employees	287.25	451.[illegible]	137.00
Provisions	851.39	1,258.72	1,491.40
Board and tuition	4,000.00	2,[illegible]73.09	3,000.00
Medical attention	35.93	7[illegible].33	[illegible]9.67
Clothing		[illegible]37.80	208.1[illegible]
Transportation of supplies	219.74	15.97	[illegible]9.25
Livestock	12.00	125.00	20.00
School farm	179.45	254.23	3[illegible]4.1[illegible]
Fuel and light		3.[illegible]0	
Traveling expenses of school officials, etc.			11.00
Manual training supplies		[illegible].32	
Feed and care of livestock			11.2[illegible]
Total	$ [illegible],000.00	$ [illegible],[illegible]73.09	$ 7,000.00

(Continued on next page)

[fol 115]

DISBURSEMENT SCHEDULE No. [illegible] (Continued)

Treaty of January [illegible], 1855		Fiscal year	
9 Stat. 821	[illegible]	[illegible]	[illegible]
Article 4			
Education			
Erection and repair of school buildings			[illegible]
Pay for superintendents and teachers			[illegible]
Furniture and equipment			[illegible]
Pay of miscellaneous employees			[illegible]
Provisions			[illegible]
Board and tuition			[illegible]
Medical attention			
Clothing			[illegible]
Transportation of supplies			310.58
Livestock			[illegible]
School farm			[illegible]
Fuel and light			[illegible]
Traveling expenses of school officials, etc.			[illegible]
Seed and care of livestock			[illegible]
[illegible]			[illegible]

[illegible]

[fol. 116]

DISBURSEMENT SCHEDULE NO 86 (Continued)

Treaty of January 4, 1845, 9 Stat. 821	Fiscal year 1860	1861	Total
Article 4			
Education:			
Erection and repair of School buildings			$ 7,591.85
Pay for superintendents and teachers	$1,072.31	$ 200.00	6,996.97
Furniture and equipment	169.08	3[illegible].40	1,765.15
Pay of miscellaneous employees	182.75	373.12	3,247.67
Provisions	1,852.29	660.24	15,138.83
Board and tuition	3,000.00	3,000.00	31,422.37
Medical attention	78.45	72.65	659.74
Clothing	89.50		2,409.25
Transportation of supplies	158.55	74.23	1,972.17
Livestock		168.00	1,292.57
School farm	355.47	328.24	4,230.51
Fuel and light	41.60		130.83
Traveling expenses of school officials, etc.		67.12	377.82
Manual training supplies			163.53
Feed and care of livestock			23.25
Total	$7,000.00	$5,000.00	$77,422.51

[fol. 117]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 1

PART III

SECTION O

This section covers pages 436 to 464 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of August 7, 1856, 11 Stat. 699.

• • • • • • •

[fol. 117a] The aforesaid treaty was ratified by the Senate of the United States on August 16, 1856, 11 Stat. 706, with the following amendments:

> "ARTICLE VI. After the words 'individuals of said nation,' insert 'except such portion, as they shall by order of said national council, direct to be paid to the treasurer of said nation for any specified national [fol. 118] object, not exceeding ($100,000) one hundred thousand dollars.'
>
> "ARTICLE VIII. Strike out the word 'sixty' and insert 'ninety.'
>
> "Add the following as
>
> "ARTICLE XXVII. 'And it is further agreed, that nothing herein contained, shall be so construed as to release the United States from any liability, other than those in favor of said nations or individuals thereof.'"

The first appropriation made pursuant to the aforesaid Treaty of August 7, 1856, was $610,000 which was carried in the act of March 3, 1857, 11 Stat. 172, of which $300,000 was for per capita payments, and $100,000 for some national object per Article 6 of said treaty as amended by the Senate; $120,000 was for the payment to self-emigrating Creeks; $70,000 for payment of claims against the Creek Nation; $10,000 for payments in lieu of reservations of land; and $10,000 as interest on the sum of $200,000, at the rate of 5 per cent per annum, being in lieu of the investment

of said sum, stipulated in Article 6 of said treaty to be invested in stocks.

By the act of March 3, 1859, 11 Stat. 409, Congress appropriated the sum of $225,166.66, being the $200,000, with interest thereon at 5 per cent, stipulated in Article 6 of the aforesaid Treaty of August 7, 1856, to be paid to or invested for the Creek Nation of Indians after the removal of the Seminole Indians to the country west of the Mis-
[fol. 119] sissippi River.

There was also appropriated annually, for the fiscal years 1859 to 1902, the sum of $10,000, being the annual interest, at the rate of 5 per cent per annum, on the aforesaid sum of $200,000 stipulated in Article 6 of the aforesaid treaty to be invested in stocks.

All of the amounts appropriated as aforesaid were set up under the appropriation "Fulfilling Treaties with Creeks," and are included in the balanced statement of said appropriation set out on pages 110 to 113.

An examination of the records of the General Accounting Office discloses that, of the amount appropriated as aforesaid, there was disbursed for the benefit of the Creek Nation of Indians and paid to the Treasurer of said Nation, pursuant to the aforesaid Treaty of August 7, 1856, the sum of $1,165,064.78. (See pages 450 to 462.)

During the fiscal years 1862 to 1867, the moneys appropriated to fulfill the various treaties with the Creek Nation, including the aforesaid Treaty of August 7, 1856, were disbursed, with few exceptions, for the relief of refugee Indians. (See page 111, Item (cc); also see pages 114 and 115.)

Disbursements of moneys appropriated to fulfill the various treaties with the Creek Nation of Indians, including the aforesaid Treaty of August 7, 1856, during the fiscal
[fol. 120] years 1899 to 1902, are set out on pages 672 to 680, for the reasons stated therein.

The $200,000 stipulated in Article 6 of the aforesaid treaty to be invested in stocks, but on which there was appropriated annually $10,000 as interest in lieu of investment, was included in the amount of $999,368 appropriated by the act of May 27, 1902, 32 Stat. 249, as commutation of the annuities due the Creek Nation under various treaties.

There was also disbursed for the benefit of the Creek Nation of Indians, and with said nation jointly with the Seminole Indians, pursuant to the aforesaid treaty the sum of $47,933.96, of which $19,257 was disbursed under the appropriation "Survey of Creek Boundary," and $28,676.96 under "Fulfilling Treaties with Florida or Seminole Indians." (See pages 463 and 464, respectively.)

With further reference to the stipulations of Article 6 of the aforesaid treaty as amended by the Senate, relative to the expenditure of $100,000 for a national object to be designated by the Creek Nation, an examination of the records of the General Accounting Office discloses that said amount was paid to the Creek Treasurer for the erection and endowment of four academies within the Creek Nation, pursuant to the request of the Creek General Council. (See page 450, note (b).)

[fol. 121]

Excerpt From Claimant's Exhibit No. 1

STATEMENT NO. 37

Disbursements made by the United States for the benefit of the Creek Nation of Indians pursuant to the Treaty of August 7, 1856, 11 Stat. 699.

	Direct	Jointly with other Indians	Total
Article 6			
Per capital payments	$525,166.66		$525,166.66
Cash payments to emigrants	120,000.00		120,000.00
Payment of Creek claims	70,000.00		70,000.00
Cash payments in lieu of reservations of land	10,000.00		10,000.00
Cash payments to Creek Treasurer	331,000.00		331,000.00
Education:			
Erection and repair of school buildings	100,000.00		100,000.00
Article 10			
Expenses of delegations	1,465.00	$27,062.96	28,527.96
Article 21			
Expenses of surveying	19,257.00	149.00	19,406.00
Miscellaneous items			
Miscellaneous agency expenses	75.00		75.00
Purchase of property and rights of the Presbyterian Mission	8,823.12		8,823.12
	(a)	(b)	(c)
Total	$1,185,786.78	$27,211.96	$1,212,998.74

(For notes (a) to (c), see next page.)

[fol. 122]

STATEMENT NO. 37 (Continued)

(a) See page 449, Item (c); also page 5, Item (n).
(b) See page 449, Item (d); also page 6, Item (t).
(c) See page 449, Item (e). For yearly disbursements by appropriations, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Schedules Nos. 88 to 90, pages 450 to 464.

[fol. 123]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

[illegible] SCHEDULE NO. 88

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Fulfilling Treaties with Creeks" (a)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1857	1858	1859
Article 6			
Per capita payments	$261,621.10		$ 8,083.20
Cash payments to emigrants			120,000.00
Cash payments in lieu of reservations of land		$8,795.10	1,204.90
Education:			
Erection and repair of school buildings (b)	100,000.00		
Total	$361,621.10	$8,795.10	$129,888.10

(Continued on next page)

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 713.

(b) This amount was paid to the Creek Treasurer, by direction of the Creek General Council, for the erection and endowment of four academies.

[fol. 124]

451

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1860	1861	1863
Article 6			
Per capita payments	$234,802.50		
Payment of Creek claims	70,000.00		
Cash payments to Creek Treasurer		$21,000.00	
Miscellaneous items			
Miscellaneous agency expenses			$ 75 00
Purchase of property and rights of the Presbyterian Mission			8,823.12
Total	$304,802.50	$21,000.00	$8,898.12

(Continued on next page)

[fol. 125]

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1868	1869
Article 6		
Cash payments to Creek Treasurer	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00

(Continued on next page)

[fol. 126]

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1870	1871	1872
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1873	1874	1875
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 128]

DISBURSEMENT SCHEDULE NO. 30 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1876	1877	1878
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 129]

DISBURSEMENT SCHEDULE NO. 88 (continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1879	1880	1881
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 130]

DISBURSEMENT SCHEDULE NO. 29 (Continued)

Treaty of August 7, 18[illegible] 11 Stat. 699	Fiscal year 19[illegible]	 19[illegible]	 1[illegible]
Article :			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 131]

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856 11 Stat. 699	Fiscal year 1885	 1886	 1887
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol 132]

DISBURSEMENT SCHEDULE No. 5 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1958	1959	2040
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 133]

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1891	1892	1893
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 134]

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1894	1895	1896
Article 6			
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	$10,000.00
Total	$10,000.00	$10,000.00	$10,000.00

(Continued on next page)

[fol. 135]

DISBURSEMENT SCHEDULE NO. 88 (Continued)

Treaty of August 7, 1856, 11 Stat. 699	Fiscal year 1897	1898	Total
Article 6			
Per capita payments			$525,166.66
Cash payments to emigrants			120,000.00
Payment of Creek claims			70,000.00
Cash payments in lieu of reservations of land			10,000.00
Cash payments to Creek Treasurer	$10,000.00	$10,000.00	331,000.00
Education: Erection and repair of school buildings			100,000.00
Miscellaneous items			
Miscellaneous agency expenses			75.00
Purchase of property and rights of the Presbyterian Mission			8,823.12
Total	$10,000.00	$10,000.00	$1,165,064.78

[fol. 136]

Excerpt From Claimant's Exhibit No. 1

STATEMENT NO. 39

Disbursements made by the United States for the benefit of the Creek Nation of Indians, pursuant to the Treaty of June 14, 1866, 14 Stat. 785.

	Direct	Jointly with other Indians	Total
Article 3			
Cash payments to Creek Treasurer	$1,419,915.15		$1,419,915.15
Per capita payments	200,382.54		200,382.54
Attorneys' fees	8,656.59		8,656.59
Education: Erection and repair of School buildings	2,000.00		2,000.00
Expenses of delegations	41,198.70		41,198.70
Cash payments to soldiers	81,425.75		81,425.75
Cash payments to loyal Creek refugees	18,573.04		18,573.04
Article 4			
Expenses of taking census	1,310.09		1,310.09
Expenses of ascertaining losses	2,233.62		2,233.62
Article 8			
Expenses of surveying	9,462.36		9,462.36
Article 9			
Erection of agency buildings	1,665.26		1,665.26
Article 10			
Expenses of holding council	6,613.85	$4,502.28	11,116.13
Expenses of taking census	1,876.50		1,876.50
Carried forward	$1,795,313.45	$4,502.28	$1,799,815.73

STATEMENT NO. 39 (Continued)

	Direct	Jointly with other Indians	Total
Brought forward	$1,795,313.45	$4,502.28	$1,799,815.73
Article 14			
Expenses of negotiating treaty	828.00		828.00
Cash payments to Creek Treasurer	9,172.00		9,172.00
Miscellaneous items			
Miscellaneous agency expenses	4,735.64		4,735.64
Pay of miscellaneous employees	414.37		414.37
Expenses of paying annuities	175.50		175.50
Removal of Creek refugees from Chickasaw reservation	2,329.50		2,329.50
Removal of Creek refugees from Cherokee reservation	2,155.95		2,155.95
Expenses of transporting and distributing Cherokee, Choctaw, Chickasaw and Creek annuities		693.41	693.41
Expenses of transporting Creek and Seminole annuities		230.25	230.25
Miscellaneous expenses of Creek and Seminole Agency		147.30	147.30
	(a)	(b)	(c)
Total	$1,815,124.41	$5,573.24	$1,820,697.65

(For notes (a), (b), and (c), see next page.)

[fol. 138]

STATEMENT NO. 39 (Continued)

(a) See page 486, Item (f); also page 5, Item (o).
(b) See page 486, Item (g); also page 6, Item (u).
(c) See page 486, Item (h); also is the aggregate of Items (aa), (c), (b), (b), and (b), pages 111, 482, 483, 484, and 485, respectively. For yearly disbursements by appropriation, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Shcedules Nos. 91 to 95, pages 487 to 503.

• • • • • • •

[fol. 139] The "Creek General Fund" was subsequently increased by the amount of $999,368 (see page 512, Item (b)), through the commutation of annuities due the Creek Nation of Indians under the various treaties pursuant to the act of May 27, 1902, 32 Stat. 249, which reads in part as follows:

> "That the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury to the credit of the Muscogee or Creek tribes the sum of nine hundred and ninety-nine thousand three hundred and sixty-eight dollars, being in full for the permanent annuities guaranteed them by the treaties of August seventh, seventeen hundred and ninety, June sixteenth, eighteen hundred and two, January twenty-fourth, eighteen hundred and twenty-six, August seventh, eighteen hundred and fifty-six, and June fourteenth, eighteen hundred and sixty-six, to be added to the Creek general fund already to the credit of said nation, and to draw interest at five per centum per annum until drawn out of the Treasury for the purpose named in the agreement with the Muscogee or Creek tribe of Indians ratified by Act of March first, nineteen hundred and one."

• • • • • • •

[fol. 140] For a period of approximately 30 years prior to 1898, all annuities and moneys due the Creek Nation of Indians under various treaties were paid to the treasurer of said nation in accordance with the stipulations of Article 7 of the Treaty of August 7, 1856, 11 Stat. 699. Beginning with the fiscal year 1899, all disbursements of annuities and moneys due said nation under various treaties were made by fiscal officers and on claim settlements. In connection with this change in the method of making disbursements, attention is invited to section 19 of the act of June 28, 1898 30 Stat. 502, which reads as . llows:

> "SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any offi-

cer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

By the act of May 27, 1902, 32 Stat. 249, the Secretary of the Treasury was authorized to place to the credit of the Creek Nation of Indians, the sum of $999,368 as payment in full of all amounts due them under various treaties, which sum was to be added to the "Creek General Fund," to draw interest at 5 per cent per annum until drawn out of the United States Treasury. (For further details in connection with said fund and act, see pages 507 to 537.)

[fol. 141] For each of the years 1899 to 1902, there was due the Creek Nation of Indians under various treaties, the sum of $49,968.40, comprising the following items: Permanent annuity of $1,500, as stipulated in the Treaty of August 7, 1790, 7 Stat. 35; permanent annuity of $3,000, as stipulated in the Treaty of June 16, 1802, 7 Stat. 68; permanent annuity of $20,000 together with permanent provisions for a wheelwright, a blacksmith and assistant, a blacksmith shop and tools, and for iron and steel, costing annually $1,710 (see Article 5, Treaty of August 7, 1856, 11 Stat. 699), as stipulated in the Treaty of January 24, 1826, 7 Stat. 286; $10,000 annually as interest at 5 per cent per annum on $200,000, as stipulated in the Treaty of August 7, 1856, 11 Stat. 699; and $13,758.40 annually as interest at 5 per cent per annum on $275,168, as stipulated in the Treaty of June 14, 1866, 14 Stat. 785.

In fulfillment of the aforesaid treaties, a total of $199,873.60 (aggregate of amounts appropriated for 1899 to 1902, as set out on pages 706, 708, 710, 714, and 716) was appropriated for the years 1899 to 1902, which was set up and carried on the books of the United States Treasury under the heading "Fulfilling Treaties with Creeks."

The amount of $199,873.60 appropriated as aforesaid, was wholly disbursed during the years 1899 to 1902 for the purposes set out on pages 678 and 679.

[fol. 142] In connection with the aforesaid disbursements, it has not been possible from an examination of the records of the General Accounting Office to identify said disbursements as having been made pursuant to the various treaties in fulfillment of which the aforesaid amount of $199,873.60 was appropriated. However, said examination discloses that, with the exception of the amount of $6,121.05 disbursed for medical attention (see page 680), said disbursements were made on tribal warrants authorized by the Creek National Council.

In addition to the amount of $199,873.60 appropriated and disbursed as aforesaid, a further sum of $12,220 was appropriated by the act of May 27, 1902, 32 Stat. 250, for payment to self-emigrating Creeks or their heirs, pursuant to the Treaty of March 24, 1832, 7 Stat. 366, and section 26 of the act of March 1, 1901, 31 Stat. 869, which was also set up and carried under the aforesaid heading "Fulfilling Treaties with Creeks."

Of the aforesaid amount of $12,220, the sum of $11,668.55 was disbursed in 1905 and 1906 in payment to self-emigrating Creeks or their heirs, and $551.45 was disbursed in 1929 for equalization of allotments. (See pages 679 and 680.)

There is set out on pages 110 to 113 a balanced statement disclosing the disposition of all moneys available pursuant to the various treaties with the Creek Nation of [fol. 143] Indians, which were set up and carried under the aforesaid heading "Fulfilling Treaties with Creeks," and the appropriations and disbursements set out and discussed in this section are included therein.

[fol. 144]

EXCERPT FROM CLAIMANT'S EXHIBIT NO. 1

STATEMENT NO. 59

Disbursements made by the United States for the benefit of the Creek Nation of Indians, during the period from July 1, 1898, to June 30, 1929, from moneys appropriated to fulfill various treaties with said nation.

Equalization of allotments	$	551.45
Medical attention		6,171.05
Administrative expenses, Creek National Government		63,496.42
Care of indigent Indians		765.00
Pay of Indian police		8,386.93
Expenses of removing intruders		710.00
Pay of judges		3,77[illegible].77
Special attorneys' fees and expenses		5,277.56
Expenses of miscellaneous litigation		409.50
Expenses of delegations		7,486.00
Cash payment to John Catt for stray steer claimed by owner		15.33
Pay of miscellaneous employees		179.00
Payments to self-emigrating Creeks		11,668.55
Education		105,750.04
	(a)	$212,093.60

(a) See page 677, Item (a); also page 5, Item (r). For yearly disbursements by appropriations, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Schedule No. 105, pages 678 to 680.

[fol. 145]

DEFENDANT'S EXHIBIT No. 187

PART III

SECTION T

This section covers pages 681 to 689 and contains information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians, during the years 1811 to 1834, for purposes stipulated in various treaties with said nation of Indians.

[fol. 146] An examination of the records of the General Accounting Office discloses that during the years from 1811 to 1834, certain disbursements were made by the United States for the benefit of the Creek Nation of Indians for purposes stipulated in various treaties with said nation, which, due to the lack of sufficient data, could not be identified as having been disbursed in fulfillment of any particular treaty. Therefore, no attempt has been made to allocate said disbursements under specific treaties, but they have been set out in this report in order to show as completely as possible all disbursements made by the United States pursuant to treaties with the Creek Nation of Indians.

[fol. 147]

Excerpts From Defendant's Exhibit No. 142

STATEMENT NO. 60

Disbursements made by the United States for the benefit of the Creek Nation of Indians, during the years 1811 to 1834, for purposes stipulated in various treaties with said nation of Indians.

Annuity, cash		$ 6,547.00
Annuity, goods		7,650.00
Cash payments to chiefs		200.00
Clothing		10,370.50
Depredations		8,017.58
Education		4,984.98
Expenses of delegations		5,153.90
Iron, etc., for blacksmith shops		1,080.15
Presents to chiefs		502.84
Provisions		5,039.20
	(a)	$49,546.15

(a) See page 684, Item (a); also page 5, Item (s). For yearly disbursements by appropriations, setting out purposes of disbursements and amounts disbursed therefor, see Disbursement Schedules Nos. 106 and 107, pages 685 to 689.

[fol. 148]

Excerpt From Defendant's Exhibit No. 142

ABSTRACT NO. 19

Abstract of disbursements made by the United States for the benefit of the Creek Nation of Indians, during the years 1811 to 1834, for purposes stipulated in various treaties with said nation of Indians.

Schedule No.	Name of appropriation	Amount disbursed
106	Civilization of Indians	$ 4,984.98
107	Indian Department	44,561.17
Total	(a)	$49,546.15

(a) See page 683, Item (a); also page 5, Item (s).

[fol. 149]

Excerpt From Defendant's Exhibit No. 142

Disbursement Schedule No. 106

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Civilization of Indians" (a)

	Calendar year		
	1830	1831	1832
Education:			
Support of Creek children at Choctaw Academy	$700.00	$887.50	$ 157.50
Support of Asbury School		350.00	
Board and tuition		384.81	(b) 1,238.50
Transportation of pupils			200.00
Total	$700.00	$1,622.31	$1,596.00

(Continued on next page)

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 702.

(b) Of this amount $472.50 was disbursed for board and tuition of Creek children at Choctaw Academy.

DISBURSEMENT SCHEDULE NO. 106 (Continued)

	Calendar year 1834	Total
Education:		
Support of Creek children at Choctaw Academy		$1,745.00
Support of Asbury school		350.00
Board and tuition		1,623.31
Transportation of pupils		200.00
Erection and repair of school buildings	$1,066.67	1,066.67
Total	$1,066.67	$4,984.98

[fol 151]

EXCERPT FROM DEFENDANT'S EXHIBIT NO. 142

DISBURSEMENT SCHEDULE NO. 107

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Indian Department" (a)

	Calendar year		
	1911	1916	1917
Annuity, goods	$3,350.00	$ 4,300.00	
Presents to chiefs	502.84		
Expenses of delegations			$2,097.74
Depredations			2,000.00
Cash payments to chiefs	200.00		
Clothing		10,370.50	
Total	$4,052.84	$14,670.50	$4,097.74

(Continued on next page)

(a) For dates of appropriation acts, statute references and amounts appropriated, see page 71[illegible].

[fol. 152]

DISBURSEMENT SCHEDULE NO. 107 (Continued)

	Calendar year		
	1818	1823	1824
Annuity, cash	$6,547.00		
Iron, etc., for blacksmith shops		$588.10	$392.05
Provisions	5,039.20		
Depredations	5,801.00		
Total	$17,387.20	$688.10	$392.05

(Continued on next page)

[fol. 153]

DISBURSEMENT SCHEDULE NO. 107 (Continued)

	Calendar year 1825	1827	Total
Annuity, cash			$ 6,547.00
Annuity, goods			7,650.00
Presents to chiefs			502.84
Expenses of delegations		$56.16	5,153.30
Depredations	$216.58		8,017.58
Clothing			10,370.50
Iron, etc., for blacksmith shops			1,080.15
Provisions			5,039.20
Cash payments to chiefs			200.00
Total	$216.58	$56.16	$44,561.17

[fol. 154]

Excerpts From Claimant's Exhibit No. 1

"Annuities to Creek Indians"
(pursuant to the Treaty of June 16, 1802)

(For disbursements under this appropriation, see Disbursement Schedule No. 5, page 137.)

Year	Act	Stat.	Amount appropriated
1819	Feb. 15, 1819	3-481	$3,000.00
1819	Mar. 3, 1819	3-519	3,000.00
1820	Mar. 3, 1819	3-519	3,000.00
1821	Mar. 3, 1819	3-519	3,000.00
1822	Mar. 3, 1819	3-519	3,000.00
1823	Mar. 3, 1819	3-519	3,000.00
1824	Mar. 3, 1819	3-519	3,000.00
1825	Mar. 3, 1819	3-519	3,000.00
1826	Mar. 3, 1819	3-519	3,000.00
1827	Mar. 3, 1819	3-519	3,000.00
1828	Mar. 3, 1819	3-519	3,000.00
1829	Mar. 3, 1819	3-519	3,000.00
1830	Mar. 3, 1819	3-519	3,000.00
1831	Mar. 3, 1819	3-519	3,000.00

(Continued on next page)

[fol. 155]

"Annuities to Creek Indians" (Continued)

Year	Act	Stat.	Amount appropriated
1832	June 4, 1832	4-527	$3,000.00
1833	Feb. 20, 1833	4-616	3,000.00
1834	June 26, 1834	4-683	3,000.00
1835	Mar. 3, 1835	4-788	3,000.00
1836	June 14, 1836	5-44	3,000.00

"Annuities to Creek Indians"
(Pursuant to the Treaty of November 14, 1805)

(For disbursements under this appropriation, see Disbursement Schedule No 3, page 148.)

Year	Act	Stat.	Amount appropriated
1806	Apr. 21, 1806	2-407	$12,000.00
1807	Apr. 21, 1806	2-407	12,000.00
1808	Apr. 21, 1806	2-407	12,000.00
1809	Apr. 21, 1806	2-407	12,000.00
1810	Apr. 21, 1806	2-407	12,000.00
1811	Apr. 21, 1806	2-407	12,000.00
1812	Apr. 21, 1806	2-407	12,000.00
1813	Apr. 21, 1806	2-407	12,000.00
1814	Apr. 21, 1806	2-407	11,000.00
1815	Apr. 21, 1806	2-407	11,000.00
1816	Apr. 21, 1806	2-407	11,000.00
1817	Apr. 21, 1806	2-407	11,000.00
1818	Apr. 21, 1806	2-407	11,000.00
1819	Apr. 21, 1806	2-407	11,000.00
1820	Apr. 21, 1806	2-407	11,000.00
1821	Apr. 21, 1806	2-407	11,000.00
1822	Apr. 21, 1806	2-407	11,000.00
1823	Apr. 21, 1806	2-407	11,000.00

"Fulfilling Treaties with Creeks"
(Pursuant to the Treaty of June 16, 1802)

(For disbursements under this appropriation, see Disbursement Schedules Nos. 6 and 105, pages 138 and 139, and 678 to 680.)

Year	Act	Stat.	Amount appropriated
1837	Mar. 3, 1837	7-68	$3,000.00
1838	July 7, 1838	5-299	3,000.00
1839	Mar. 3, 1839	5-325	3,000.00
1840	July 22,1840	5-403	3,000.00
1841	Mar. 3, 1841	5-418	3,000.00
1842	July 17,1842	5-494	3,000.00
1845	June 17, 1844	5-706	3,000.00
1846	Mar. 3, 1845	5-768	3,000.00
1847	July 27, 1846	9-23	3,000.00
1848	Mar. 1, 1847	9-135	3,000.00
1849	July 29, 1848	9-255	3,000.00
1850	Mar. 3, 1849	9-385	3,000.00
1851	Sept. 30,1850	9-547	3,000.00
1852	Feb. 27, 1851	9-577	3,000.00
1853	Aug. 30, 1852	10-44	3,000.00
1854	Mar. 3, 1853	10-228	3,000.00
1855	July 31, 1854	10-319	3,000.00
1856	June 30, 1855	10-686	3,000.00
1857	Aug. 18, 1856	11-69	3,000.00
1858	Mar. 3, 1857	11-172	3,000.00
1859	May 3, 1858	11-277	3,000.00
1860	Feb. 28, 1859	11-392	3,000.00
1861	July 19, 1860	12-48	3,000.00
1862	Mar. 2, 1861	12-224	3,000.00
1863	July 5, 1862	12-515	3,000.00
1864	Mar. 3, 1863	12-778	3,000.00
1865	June 2[illegible], 1864	13-[illegible]	3,000.00
1866	Mar. 3, 1865	13-[illegible]	3,000.00
1867	July 26, 1866	14-[illegible]	3,000.00
1868	Mar. 2, 1867	14-498	3,000.00
1869	Mar. 27, 1868	15-[illegible]	3,000.00
1870	Apr. 10, 1869	16-21	3,000.00
1871	July 15, 1870	16-341	3,000.00
1872	Mar. 3, 1871	16-[illegible]	3,000.00
1873	May 28, 1872	17-154	3,000.00
1874	Feb. 14, 1873	17-[illegible]	3,000.00
1875	June 2[illegible], 1874	18-154	3,000.00
1876	Mar. 2, 1875	18-428	3,000.00
1877	Aug. 1[illegible], 1876	19-181	3,000.00

(Continued on next page)

[fol. 157]

"Fulfilling Treaties with Creeks" (Continued)

Year	Act	Stat.	Amount appropriated
1878	...r. 3, 1877	19-276	$3,000.00
1879	May 27, 1878	20-69	3,000.00
1880	Feb 17, 1879	20-300	3,000.00
1881	May 11, 1880	21-115	3,000.00
1882	Mar. 3, 1881	21-489	3,000.00
1883	May 17, 1882	22-73	3,000.00
1884	Mar. 1, 1883	22-436	3,000.00
1885	July 4, 1884	23-80	3,000.00
1886	Mar. 3, 1885	23-367	3,000.00
1887	May 15, 1886	24-32	3,000.00
1888	Mar. 3, 1887	24-450	3,000.00
1889	July 29,1888	25-321	3,000.00
1890	Mar. 2, 1889	25-994	3,000.00
1891	Aug. 19, 1890	26-340	3,000.00
1892	Mar. 3, 1891	26-993	3,000.00
1893	July 13, 1892	27-128	3,000.00
1894	Mar. 3, 1893	27-616	3,000.00
1895	Aug. 15, 1894	28-291	3,000.00
1896	Mar. 2, 1895	28-881	3,000.00
1897	June 10, 1896	29-326	3,000.00
1898	June 7 1897	30-66	3,000.00
1899	July 1, 1898	30-570	3,000.00
1900	Mar. 1, 1899	30-929	3,000.00
1901	May 31, 1900	31-226	3,000.00
1902	Mar. 3, 1901	31-1065	3,000.00
		(a)	$12,000.00

[fol 139]

"[illegible] Counties with Census" [illegible]

Year	Act	Vol.	Page	Amount appropriated
1852	Feb. 27, 1851	2	271	$12,000.00
1853	Aug. 30, 1852	10	44	2,220.00
1854	Mar. 3, 1853	10	226	2,220.00
1855	July 31, 1854	10	313	2,220.00
1856	Mar. 3, 1855	10	699	2,220.00
1857	Aug. 18, 1856	11	70	2,220.00
1858	Mar. 3, 1857	11	173	2,220.00
1859	May 5, 1858	11	277	2,220.00
1860	Feb. 26, 1859	11	393	2,220.00
1861	June 19, 1860	12	40	2,220.00
1862	Mar. 3, 1861	12	252	2,220.00
1863	July 2, 1862	12	415	2,220.00
1864	Mar. 3, 1863	12	714	2,220.00
1865	Mar. 3, 1864	13	101	7,725.00
1866	[illegible]	[illegible]	[illegible]	[illegible]
				$[illegible]

"Fulfilling Treaties with Creeks" (Continued)

Year	Act	Stat.	Amount appropriated
1856	Mar. 3, 1855	10-689	$2,710.00
1857	Aug. 18, 1856	11-70	2,710.00
1858	Mar. 3, 1857	11-173	2,710.00
1859	Mar. 5, 1858	11-277	2,710.00
1860	Feb. 28, 1859	11-393	2,710.00
1861	June 19, 1860	12-48	2,710.00
1862	Mar. 2, 1861	12-224	2,710.00
1863	July 5, 1862	12-516	2,710.00
1864	Mar. 3, 1863	12-778	2,710.00
1865	June 25, 1864	13-166	2,710.00
1866	Mar. 3,1865	13-545	2,710.00
1867	July 26, 1866	14-259	2,710.00
1868	Mar. 2, 1867	14-498	2,710.00
1869	July 27, 1868	15-206	2,710.00
1870	Apr. 10, 1869	16-21	2,810.00
1871	July 15, 1870	16-341	2,810.00
1872	Mar. 3, 1871	16-551	2,810.00
1873	May 29, 1872	17-171	2,810.00
1874	Feb. 14, 1873	17-445	2,810.00
1875	June 22, 1874	18-154	1,000.00
1877	Aug. 15, 1876	19-181	2,710.00
1878	Mar. 3, 1877	19-276	2,710.00
		(a)	$105,600.00

(a) See page 110, Item (e).

[fol. 161]

"Fulfilling Treaties with Creeks"
(Pursuant to the Treaty of August 7, 1856)

(For disbursements under this appropriation, see Disbursement Schedules Nos. 88 and 105, pages 450 to 452 and 678 to 680.)

Year	Act	Stat.	Amount appropriated
1858	Mar. 3, 1857	11-173	$610,000.00
1859	May 5, 1858	11-278	10,000.00
1860	Feb. 28, 1859	11-393	10,000.00
1860	Mar. 3, 1859	11-409	225,166.66
1861	June 19, 1860	12-49	10,000.00
1862	Mar. 2, 1861	12-225	10,000.00
1863	July 5, 1862	12-516	10,000.00
1864	Mar. 3, 1863	12-779	10,000.00

(Continued on next page)

[fol. 162]

"Fulfilling Treaties with Creeks" (Continued)

Year	Act	Stat.	Amount appropriated
1865	June 25, 1864	13-166	$10,000.00
1866	Mar. 3, 1865	13-545	10,000.00
1867	July 25, 1866	14-260	10,000.00
1868	Mar. 2, 1867	14-499	10,000.00

[fol. 163]

EXCERPTS FROM CLAIMANT'S EXHIBIT No. 3

SOUTHERN SUPERINTENDENCY.

Referring to my last annual report, it will be seen that, at that date, we were in possession of but little accurate information in relation to the Indians of this superintendency.

Owing to the rebellion, neither the superintendent nor any of the agents (excepting the agent for the Neosho agency) had been able to repair to their respective posts of duty. It was believed, however, that a strong Union sentiment existed amongst the various tribes, which only needed military force sufficient to protect the loyal to secure its development. What was then believed has since been demonstrated in the strongest possible manner. In no part of the country have the sufferings and privations endured, and the sacrifices made by loyal citizens, on account of their fidelity to their country, exceeded those of the loyal Indians of this superintendency.

Among the earliest efforts of the seceded States was an endeavor to sever the allegiance of the Indians to the government, and secure their co-operation. The fact that the agents first appointed by the present administration to reside with them all proved traitors to their trust rendered this effort partially successful. Every species of fraud and [fol. 164] deception was resorted to to mislead them. They were gravely told that the government was at an end; that they would never be paid their annuities; that this city had been captured; that the United States government was overthrown; and, in short, that their only hope for the security resulting from a firm and stable government lay in joining their fortunes with the so called Southern Confederacy.

The withdrawal of our troops from their country, the complete interruption of communication, and the assurances made by traitorous agents, gave an air of plausibility to these ridiculous stories, and resulted in the formation of a powerful secession party in their midst. As has been the case in all other localities so it was here; the secessionists

were violent and aggressive, and hesitated not in resorting to cruel and forcible means to crush out every sentiment of loyalty. For many months the loyal party steadily resisted the tide of treason setting in upon them, and at length were compelled to resort to arms in defence of their persons and property. In December last, I learned that a very considerable force of Indian warriors, composed of Creeks, Seminoles, and a few members of all the other tribes, except, perhaps, the Choctaws and Chickasaws, had twice met in battle and defeated the rebel forces, who are represented to have greatly exceeded them in numbers and in military equipments. About this time, in compliance with repeated suggestions from this office, it was determined by the War Department to organize and send into the Indian country a force, composed in part of 4,000 volunteers, to be raised from amongst the loyal Indians of the central superintendency, to protect the loyal Indians, and enforce the authority of the United States government in the Indian territory; and orders were accordingly issued to that effect to Major General Hunter, then in command of the military department embracing that country. In compliance with instructions received from you I repaired to Kansas, in January last, for the purpose of rendering General Hunter such assistance in the execution of the orders above mentioned as might be in my power. On arriving in Kansas I learned from General Hunter that the rebels, being largely reenforced by troops from Texas, had fought a third battle with the loyal Indians, resulting in the defeat and complete overthrow of the latter, who, with their old men, women, and children, had been compelled to flee for their lives from the country, and to the number of from 6,000 to 8,000, under the lead of O-poth-lo-yo-ho-lo, a very aged and influential Creek, had taken refuge near the southern border of Kansas, and were being fed from stores provided for the army of General Hunter, who, upon learning their disastrous condition, instantly detailed officers to go to their assistance, and was doing everything in his power to alleviate their sufferings. It would be impossible to give an adequate description of the suffering endured by these people during their flight, and for several weeks after their arrival. When it is remembered that they were collected for the journey, with

scarcely a moment for preparation, amid the confusion and dismay of an overwhelming defeat; that their enemies were close upon them, flushed with victory, maddened by recent defeats, and under their well known code of warfare would [fol. 165] spare neither age nor sex, it may well be believed that their preparations for the journey were wholly inadequate. It was in the dead of winter, the ground covered with ice and snow, and the weather most intensely cold. Without shelter, without adequate clothing, and almost destitute of food, a famishing, freezing multitude of fugitives, they arrived in Kansas entirely unexpectedly, and where not the slightest preparation had been made to alleviate their sufferings or provide for their wants. Within two months after their arrival two hundred and forty of the Creeks alone died, in consequence of their exposure and want. Over a hundred frosted limbs were amputated within a like period of time. From these facts some idea may be formed of the intensity of their sufferings.

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[fol. 166]

No. 25.

TEMPORARY OFFICE OF CREEK AGENCY,
Le Roy, Coffee County, Kansas, September 30, 1862.

SIR: In accordance with the requirements of the Indian department, I have the honor to transmit herewith my first annual report, giving a statement of the condition of the Creek Indians, now under my charge.

Immediately on the receipt of my appointment as agent of the Creek Indians, and after having reported to you at Fort Leavenworth for duty, I proceeded south, with the intention of going direct to the Creek agency, but being informed, on reaching the southern border of Kansas, that the rebels were, as they are now, in possession of nearly all the Indian Territory, I deemed it unsafe to go any further, and therefore returned.

I then used every effort to communicate with the chiefs of my tribe for the purpose of assuring them of the permanency of the federal government, as well as its desire

that they should remain loyal. On or about the 1st day of November, 1861, a delegation of Indians, composed of Creeks, Seminoles, and Chickasaws, came up to Le Roy, Coffee county, Kansas, to consult with the government officers in reference to the intentions of the federal government regarding the protection due them under treaty stipulations.

After counselling with them I concluded to take them to Fort Scott, in order to advise with General Lane on the subject, who was at that time in command of that place; but on reaching there I found that he had gone to Washington, and after consulting with Colonel Montgomery, General Lane's successor, it was deemed advisable to take the delegation to Washington city. I then went with them to Fort Leavenworth, where we had a council with General Hunter, who fully concurred with the views of Colonel Montgomery, and therefore we immediately left for Washington, and I am gratified to say that the result of that journey has strengthened their confidence and belief in the power and stability of the government.

A few days after my return to Kansas with the delegation, I was informed that a large body of Creek Indians had been driven from their homes, and were then on their way to Kansas. Upon the receipt of that news I immediately proceeded to Leavenworth for the purpose of consulting with you and the officer in command of the department of Kansas as to what action was to be taken in the premises. On my arrival there I found that you were also in possession of that intelligence, and were making vigorous efforts to relieve the necessities of those refugee Indians, in which you were warmly seconded by General Hunter; and after consultation on the subject it was deemed advisable that we should remain until the arrival of Hon. William P. Dole, Commissioner of Indian Affairs, who was then daily expected at Leavenworth.

On his arrival, and after having received full instructions, I started for the camps of the southern refugee Indians, which were at that time located on the Verdigris; and, on reaching them, I found the terrible tale which had been told me most too true, but only a shadow of what really existed.

[fol. 167] They had fought several battles with the rebels, in the first two of which they had been successful; but in the last one they had been overwhelmed, and, owing to shortness of ammunition and arms, they were under the necessity of retreating, by which they had lost all their teams, into which they had gathered their most valuable effects, as also a large portion of their ponies, with which they were endeavoring to remove their families to a place of safety. Numbers of families had become separated during the fight with the rebels, of whom many were captured and taken back, and in consequence of which the wildest confusion prevailed, but the main body succeeded in keeping together, and made good their escape.

The weather was intensely cold, and with a bitter northwest wind in their faces, and over the snow-covered roads, they travelled all night and the next day, without halting to rest. Many of them were on foot, without shoes, and very thinly clad, and, having lost nearly all their bedding on the battle-field, their suffering was immense and beyond description.

In this condition they had accomplished a journey of about three hundred miles; but quite a number of them froze to death on the route, and their bodies, with a shroud of snow, were left where they fell to feed the hungry wolves.

I doubt much if history records an instance of sufferings equal to these. Among the Creeks the suffering had been the most severe; they lost everything except what they had on their backs. Families who in their country had been wealthy, and who could count their cattle by the thousands and horses by hundreds, and owned large numbers of slaves, and who at home had lived at ease and comfort, were without even the necessaries of life.

Immediately on your arrival, as well as the agent's, the most strenuous efforts were made for their relief, and in a very short time they were comparatively comfortably situated.

After remaining on the Verdigris for some time, about two thousand of their ponies had died of cold and hunger in and around their camps, and the water there having become unfit for use, it was determined upon by the superintendent and agents to move these Indians to a more

healthy location. The Creeks were accordingly removed near to the town of Le Roy, Coffee county, Kansas, which is situated on the Neosho river, a distance of thirty miles from the Verdigris, and were placed by permission of the owners on lands belonging to the whites, where they still remain. On their first arrival there they did not fully understand the value of timber, and it required a vast amount of labor on my part to prevent them from cutting the same; but this difficulty is now obviated. The general deportment of the Indians here has been good, and elicited the warmest encomiums of the whites.

While at the Verdigris I took a careful enumeration of the Creeks, and found them to number four thousand and five hundred, including men, women, and children. I also enrolled, according to instructions, all the warriors under my charge. About nine hundred offered their services to the government: but they were very much disappointed at the failure of the first expedition. They were subsequently mustered into the service, and now form, together with the Seminoles, the 1st Indian regiment. They have so far proved themselves most excellent and efficient soldiers, and have fought with such bravery and determination that has surpassed the most ardent expectations.

* * * * * * *

[fol. 168] All of which is respectfully submitted.

Very respectfully, your obedient servant,

GEORGE A. CUTLER,
United States Indian Agent.

HON. WM. G. COFFIN,
Superintendent Indian Affairs, Leavenworth.

[fol. 169]

No. 30.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, June 5, 1862.

SIR: I return, herewith, a resolution adopted by the House of Representatives, in the following words, calling for information from you relative to the southern refugee Indians who are now in Kansas; which resolution was, on the 29th instant, referred by you to this office for the information sought.

I cannot, perhaps, better give the information desired than by reporting the action of this office more or less in detail. On the 9th day of January last I received information that the disloyal Indians in the territory west of Arkansas, aided by a considerable force of white troops from Texas and Arkansas, had attacked the Union or loyal Indians of that territory.

The Union Indians, as nearly as I could ascertain, were composed of three-fourths of the Creeks, one-half or two-thirds of the Seminoles, and members from all other tribes in said Territory, except, perhaps, the Choctaws and Chickasaws, of whom very few, if any, adhered to the government.

Notwithstanding the abandonment of all the forts of the territory by the United States troops, and treachery of the superintendent and agents first appointed by the present administration, these Indians stood firmly to their treaty obligations with the United States, and under the renowned O-poth-le-yo-ho-lo, met their opponents upon the battle field. Twice they succeeded in repulsing the combined forces of whites and Indians arrayed against them, but in the third battle, which took place early in January last, they were defeated and compelled to flee from the country with their families, leaving everything in the way of property that would impede their flight. They reached Kansas about the middle of that month. When in December last, and previous to any knowledge of their defeat, I learned of the noble struggle then being made by O-poth-le-yo-ho-lo and the Creeks, Seminoles, and other Indians under him, I renewed, through you, my application to the War Department for troops for their relief, which resulted in authority being given to General Hunter to organize and arm four thousand

loyal Indians, to accompany the expedition then proposed to be sent into the Indian country under General Lane. On the third day of January last I received your communication (copy, herewith, marked A,) authorizing me to assist General Hunter in the organization of these Indians. After advising with the President and yourself, I proceeded to Fort Leavenworth, in Kansas, which point I reached late in January last.

On my arrival I was informed by General Hunter that O-poth-le-yo-ho-lo had been defeated, and was, with five or six thousand of his people, in southern Kansas in a most deplorable condition; men, women, and children naked, [fol. 170] starving, and without shelter. Numbers of them had been wounded in battle, and very many being barefooted, and otherwise exposed, were badly frozen. The sick and feeble, the dead and dying, were scattered along their route for a hundred mile or more. I had no information until I reached Kansas of these disasters.

On the 6th day of February I received a communication from General Hunter, with accompanying documents, (copies, herewith, marked B, C, D,) advising me that he could only supply these people with provisions temporarily; that the provisions made by the officers under his command for their support would be exhausted by the 15th day of February, and that from that time I would be expected to make provision for them. I could but feel that the responsibility was great. The numbers had been accumulating until it was estimated that they amounted to eight thousand to be provided for, and these lying upon the ground, which was covered with snow and ice, and the weather intensely cold General Hunter advised me that he had no authority to furnish them clothing, but that Superintendent Coffin, acting under his advice, had purchased some ten thousand dollars worth of blankets and other necessaries. It will be seen that this purchase amounted to no more than $1 25 to $1 50 for each person, and left them about as destitute as before. They were, therefore, not only to be fed, but also clothed. I had no funds applicable to the purpose, and was powerless to relieve them except by purchases made on the faith of an appropriation to be

at the discretion of Congress. The superintendent was in southern Kansas, so that I could not consult or reach him with instructions as to the immediate wants of the Indians. I therefore appointed Dr. William Kile, of Illinois, who, being commissioned by the President to act upon General Lane's staff, was then in Kansas, and had been detailed by that officer as brigade quartermaster, as a special agent to act temporarily in supplying the necessities of these wards of the government. (See copy of instructions, herewith, marked E.) On the same day I telegraphed to you, as follows: "C. B. Smith, Secretary of the Interior; Six thousand Indians driven out of Indian territory, naked and starving. General Hunter will only feed them until 15th. Shall I take care of them on the faith of an appropriation?" To which I received the following reply: "Go on and supply the destitute Indians, Congress will supply the means. War Department will not organize them." I was also advised by you that difficulties had arisen in the way of organizing Indians into the army; that General Lane's expedition had been countermanded, but that it was not expected that it would be abandoned, but would go forward under command of General Hunter, with whom I arranged verbally for the protection of the Indians to their homes whenever it should proceed.

* * * * * * *

[fol. 171] Very respectfully, your obedient servant,

WM. P. DOLE, *Commissioner.*

Hon. C. B. SMITH,
Secretary of the Interior.

[fol. 172]

Excerpts From Claimant's Exhibit No. 4

As you are aware, the most of the refugees from the "Indian country" are now located in Kansas and the country immediately south, where the old men, women, and children—all, or nearly so, of the able-bodied males being in the federal armies—are being subsisted from the funds held in trust for several of the southern tribes by the government. The formidable front elsewhere presented by the rebellion has hitherto prevented the organization of a military force sufficient to drive the rebels from the Indian country and return the Indians to their homes. It is to be hoped, now that the Mississippi has been opened, and the power of the rebels in the west and southwest seems irretrievably broken and hastening to its final overthrow, that a military expedition, adequate to "take, hold, and possess" the country, may be speedily sent thither, and the loyal Indians reinstated in the enjoyment of their possessions.

The various tribes of the superintendency are the Osages, the Quapaws, Senecas and Shawnees, the Cherokees, Creeks, Seminoles, Choctaws, Chickasaws, and the Witchitas, and other affiliated bands.

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[fol. 173] The refugee Creeks who came up with old O-poth-le-yo-ho-la, from the Creek nation have furnished most all their able-bodied men to the army, and the balance, numbering about 3,200, mostly women and children, have been, and are now being subsisted by the government at the Sac and Fox agency, where Agent Cutler cares for their wants.

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[fol. 174]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 7

We come now to the series of treaties made with the tribes or nations resident in the Indian country south of Kansas. In the annual report of this office for 1865 a very full statement and report was made of the conferences at Fort Smith, Arkansas, resulting in a preliminary treaty with those tribes, by which general terms of peace were established, they having to a greater or less extent engaged in the rebellion against the government, and it was agreed that delegates should be sent to Washington for the purpose of concluding formal treaties with each tribe or nation for the settlement of all questions of difference arising from the war, and for re-establishing the Indians upon their lands, under clearly defined provisions, applying to all classes of their population. With this purpose in view, the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws, appeared in this city in January, 1866, by their representatives duly chosen, there being double delegations in some cases, respectively representing two parties in each nation—those who had remained loyal to the government and true to their treaty stipulations, and those who had taken part in the rebellion. These negotiations were carried on, on the part of the government, by the Commissioner of Indian Affairs in connexion with Colonel E. S. Parker, and Superintendent Sells. Four principal points came up for settlement, to wit:

The proper and just method of adjusting affairs between the loyal and disloyal, this point applying especially to the Cherokees, where confiscation laws, passed by the national council, had taken effect upon the property of those who were disloyal.

The proper relations which the freedmen should hereafter hold towards the remainder of the people.

A fair compensation for losses of property occasioned to those who remained loyal by the disloyal party.

Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas.

* * * * * * *

[fol. 175] The next treaty in this series was made with the *Creeks:* Concluded June 14, 1866; ratification advised, with amendment, July 19; amendment accepted July 23, and proclaimed August 11, 1866.

This treaty re-establishes peace and friendship, declares amnesty for past offences, and establishes the freedmen in full equality of rights and privileges, as well as a share in the national soil and funds. The adjustment of this question occupied a long time. But one delegation from the Creeks appeared here at first, and with them a treaty was made which recognized the rights of the freedmen to full equality; but, at about the time this treaty was made, other delegates came on, representing the southern or "disloyal" Creeks, who constituted about one-half of the people, and strenuously opposed the consummation of the treaty on account of this very provision. They engaged able counsel, and, as the result of their opposition, the treaty came back from the President for revision. It appeared at one time as if all negotiations must fail, and the Commissioners, knowing the necessity of some settlement of the affairs of the people and relief for the destitute among them, were disposed to urge the national delegates to yield the point for the present, but they held out firmly for their freedmen, urging that when the brave old Opothleyoholo, resisting all the blandishments of the rebel emissaries, and of his Indian friends, stood out for the government, and led a large number of his people out of the country, fighting as they went, abandoning their homes, they promised their slaves that if they would remain also faithful to the government they should be free as themselves. Under these circumstances the delegates declined to yield, but insisted that that sacred pledge should be fulfilled, declaring that they would sooner go home and fight and suffer again with their faithful friends than abandon the point. They were successful at last, and the treaty guarantees to their freedmen full equality. The Indians cede to the government, to be used for the settlement thereon of other Indians, the west half of their domain, estimated at 3,250,560 acres of land, for which the government is to pay $975,168, in the following manner: $200,000 to enable the Creeks to reoccupy and restore their farms

and improvements, to pay the damages to mission schools, and to pay the salary of the delegates to Washington; $100,000 to be paid for losses of soldiers enlisted in the United States army, and to loyal refugees and freedmen; $400,000 to be paid *per capita* to the Creeks as it may accrue from the sale of lands; interest on the last two sums, at five per cent., to be used for the Creeks, at the discretion of the Secretary of the Interior; and the remaining sum due, or $275,000, is to be invested at five per cent., and the interest paid to the Indians annually. The amounts due to soldiers and refugees are to be ascertained under direction of the superintendent and agent, and re- [fol. 176] ported to the department for approval. Right of way for railroads is provided. The western boundary is to be surveyed at the expense of the United States. An amount not exceeding $10,000 is to be expended by the United States in the erection of agency buildings upon the diminished reservation. The provisions for a general council are the same as in the Seminole treaty. Annuities, as provided in former treaties, are to be renewed and continued. The government to pay $10,000 for expenses of negotiating this treaty, if so much be necessary.

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[fol. 177]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 8

The failure of the United States government to give the Indians, in season, the necessary assurance that they would be protected, no matter what might happen, can not be too severely criticized. It indicated a very short-sighted policy and was due either to a tendency to ignore the Indians as people of no importance or to a lack of harmony and coöperation among the departments at Washington. Such an assurance of continued protection was not even framed [fol. 178] until the second week in May and then the Indian country was already threatened by the secessionists. Moreover, it was framed and intended to be given by one department, the Interior, and its fulfilment left to another, the War. It went out from the Indian Office in the form

of a circular letter,[114] addressed by Commissioner William P. Dole to the chief executive[115] in each of the five great tribes. It assured the Indians that President Lincoln had no intention of interfering with their domestic institutions or of allowing government agents or employees to interfere and that the War Department had been appealed to to furnish all needed defense according to treaty guaranties. The new southern superintendent, William G. Coffin of Indiana, was made the bearer of the missive; but, unfortunately, quite a little time elapsed[116] before the military situation[117] in the West would allow him to assume his full

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[114] The letter can be found in manuscript form in Indian Office, *Letter Book*, no. 65, pp. 447-449, and in printed form in Commissioner of Indian Affairs, *Report*, 1861, p. 34.

[115] *John Ross*, principal chief of the Cherokee Nation; *Cyrus Harris*, governor of the Chickasaw Nation; *M. Kennard*, principal chief of the Lower Creeks; *Echo Hadjo* [Echo Harjo], principal chief of the Upper Creeks; *George Hudson*, principal chief of the Choctaw Nation; and the unnamed principal chief of the Seminoles west of Arkansas.

[116] It would seem that the letter was not given to Coffin immediately but was held back on account of the insecurity of the mails [Dole to Creek and Seminole chiefs, November 16, 1861, Indian Office, *Letter Book*, no. 67, pp. 78-79].

[117] The delay was not entirely due to the military situation. Coffin went from Washington to his home in Indiana. He was there on the twentieth, at Annapolis, Parke County, when Dole wrote urging him to hasten on his way,

> I herewith enclose a slip taken from the National Intelligencer of this date, being an extract from the Austin [Texas] State Gazette of the 4th Instant, by which you will perceive that efforts are being made to tamper with the Indians within your Superintendency.
>
> By this you will perceive the urgent necessity, that you should proceed at the earliest moment practicable to the vicinity of the duties in your charge, that from your personal knowledge of the views of the Government in relation to these Indians as well as by the instructions and communications in your possession, you may be able to thwart the endeavors of any and all who have or shall attempt to tamper with these tribes and array them in hostility to the Government.
>
> I deem it of the utmost importance that no time be lost in this matter, as delay may be disastrous to the public service.—Indian Office, *Letter Book*, no. 65, p. 473.

[*Footnote continued*]

[fol. 179] duties or to reach his official headquarters,[118] and, in the interval, he was detailed for other work. The [fol. 180] Indians, meanwhile, were left to their own de-

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By the nineteenth of June, Coffin had managed to reach Crawford Seminary, from which place he reported to Dole,

> We have at length reached the Indian Territory propper. . . I find Mr. Elder the Agent absent. I learned on my way down here that he had gone to Fort Scott with the view of locating the Agency there for the present which I supposed when I wrote you from the Catholic Mission might be propper from its close proximity to Missouri but as Mr. Phelps district is opposit here and he is a good Union man and has been Stumping the district and I learn that the Union cause is growing fast in that part of the State I think there is now at least no Sort of excuse for removing, the buildings here are ample for a large family, watter good. . .—General Files, *Southern Superintendency, 1859-1862*, C1229.

The sequel showed that Agent Elder was right and Superintendent Coffin wrong about the security of the region. Coffin never reached Fort Smith at all and was soon compelled to vacate the Indian Territory. Indian Office, *Letter Book*, no. 66, which covers the period from June, 1861 to October, 1861, contains scarcely a letter to prove that the Indian Office was in communication with Indian Territory. Official connection with the country had been completely cut off. Military abandonment and dilatory officials had done their work.

[118] Official instructions were issued to Coffin, then in Washington, on the ninth, and gave him permission to change his headquarters at discretion. The following is an excerpt of the instructions:

> You having been appointed by the President to be Superintendent of Indian Affairs for the Southern Superintendency in place of *Elias Rector*, Esq. . . You will repair to Fort Smith, Arkansas, as early as practicable, for the purpose of relieving *Elias Rector*, Esq.
>
> In your progress from Indiana to Fort Smith, should you deem it expedient and advisable to pass down the Kansas line and among the Indians in that section, you will make it your business to inquire as to their sentiments and disposition with reference to the present disturbances in the neighboring countries, so far as time and opportunity will enable you to do so. On reaching Fort Smith you will also inform yourself as to the condition of Affairs there and surrounding country, and as to the prospect of the business of the Superintendency being carried on without molestation or other inconvenience, and should you find it necessary from the circumstances that may surround you to remove the office of Superintendent from

vices and were obliged to look out for their own defense as best they could.

To all appearances neither the legislative action of the Chickasaws and of the Choctaws nor the work of the intertribal council was, at the time of occurrence, reported officially to the United States government or, if reported officially, then not pointedly so as to reveal its real bearings upon the case in hand. All the agents within Indian Territory were as usual southern men;[119] but may not have been directly responsible or even cognizant of this particular action of their charges. The records show that practically all of them, Cooper, Garrett, Cowart, Leeper, and Dorn, were absent[120] from their posts, with or without leave, the

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Fort Smith you are authorized to do so, selecting some eligible point in the proximate Indian Territory, or if required some point northwardly among the Indians in Kansas as your best discretion may dictate. I trust however that this discretionary authority may prove unnecessary and that in the legitimate discharge of your duties, you may suffer no interruption from any cause or source whatever. In a report from this Office of the 30th Ultimo, with reference to anticipated Indian troubles in your Superintendency consequent upon the removal of the troops from Fort Cobb, the attention of the *Hon. Secretary of the Interior* was called to the subject, and the enquiry as to the policy of the Government to keep in the country a sufficient force for the purpose of proper protection; and further calling his attention to the expression of friendship and loyalty made by the Choctaw and Chickasaw delegates lately in this City, recommended that a depot for arms be established within the Southern Superintendency, in order that the Indians there may be placed in possession of the means to defend themselves against any attack. As yet no response to this report has been received. . .—Indian Office, *Letter Book*, no. 65, pp. 442-443.

[119] Douglas H. Cooper, agent for the Choctaws and Chickasaws, was from Mississippi; William H. Garrett, agent for the Creeks, was from Alabama; Robert J. Cowart, agent for the Cherokees, was from Georgia; Matthew Leeper, agent for the Indians of the Leased District, was from Texas; and Andrew J. Dorn, agent at the Neosho River Agency, was from Arkansas.

[120] Telegram, Greenwood to Rector, January 19, 1861 [Indian Office, *Letter Book*, no. 65, p. 104].

[fol. 181] first part of the new year and that every one of them became or was already an active secessionist.[121]

It has been authenticated and is well understood today that, as the Southern States, one by one, declared themselves out of the Union or were getting themselves into line for so doing, they prepared to further the cause of secession among their neighbors and, for the purpose, sent agents or commissioners to them, who organized the movement very much as the Committees of Correspondence did a similar movement prior to the American Revolution. In short, in the spring of 1861, the seceding states entered upon active proselytism and at least two of them extended their labors to and among the Indians. Those two were Texas and Arkansas. Missouri also worked with the same end in view, so did Colorado, but apparently not so much with the great tribes of Oklahoma as with the politically less important of Kansas. Colorado, it is true, did operate to some extent upon the Cherokees of the Outlet and upon the Wichitas, but mostly upon the Indians of the western plains. No one can deny that, in the interests of the Confederate cause, the project of sending emissaries even to the Indians was a wise measure or refuse to admit that the contrasting inactivity and positive indifference of the North was foolhardy in the extreme. It indicated a self-complacency for which there was no justification. More than that can with truth be said; for, from the standpoint of political wisdom and foresight, the inactivity where the Indians were concerned was conduct most reprehensible.

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[fol. 182] At the North Fork Village, everything seemed to be working in Pike's favor. There was scarcely a white man[357] around who was willing to say a word for the North; and leading Indians, who were known to be anti-secession-

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[121] For information showing what Indian agents became adherents of the Confederate cause, see, among other things, an extract from a report of Albert Pike to be found in Indian Office, *Letter Book*, no. 130, pp. 237-238; and a letter from R. W. Johnson to L. P. Walker, published in *Official Records*, first ser., vol. iii, 598.

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[357] See letter of W. S. Robertson to the Secretary of the Interior [General Files, *Southern Superintendency, 1859-1862*, R1664].

ists, were away[358] treating with the Indians of the Plains. [fol. 183] Opoeth-le-yo-ho-la, who was to become the stanch leader of the opposition, was not with the absentees, it would seem; but then that, at the time, did not so much signify because he was not a ranking chief and so had little influence.[359] On the tenth of July, the treaty that Pike and

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[358] See statement of the "Loyal" Creek Delegation at the Fort Smith Council, September, 1865 [Land Files, *Indian Talks, Councils, etc., 1865-1866*, Box 4; Commissioner of Indian Affairs, *Report*, 1865, pp. 328-329].

[359] Opoeth-le-yo-ho-la was nevertheless a very prominent man among the Upper Creeks and had been prominent even before the exodus from Georgia and Alabama. At all events he was sufficiently prominent to protest with others against the transportation contracts that had been made by the War Department [Lewis Cass to Opoeth-le-yo-ho-la and other Creek chiefs, dated Tuckabatchytown, Alabama, January 27, 1836]. Again in 1838, Opoeth-le-yo-ho-la headed a party of protest, that time against the selling of certain Creek lands left unsold at the time of emigration [*Creek Reservation Papers*, 25].

Opoeth-le-yo-ho-la seems to have been one of the assassins of William McIntosh; that is, if the subjoined statement of Acting-superintendent William Armstrong is to be trusted:

> Choctaw Agency August 31, 1836
>
> C. A. Harris, Esqr, Comr of Ind Affairs,
>
> Sir: The first party of emigrating Creeks are now on the opposite side of the river Arkansas, on their way up. I shall leave tomorrow so as to meet them at Gibson; while there, I will see the McIntosh party and endeavor to learn the state of feelings amongst the several parties. Many threats have been made; and much dissatisfaction manifested by both Chilly & Rolly McIntosh, the latter has sworn to kill A-po-the-ho-lo who was concerned in taking the life of his Father. Rolly McIntosh and the other Chiefs now over, are opposed to Ne-a-math-la the Chief who is with the party emigrating, upon the ground mainly that they may probably be superseded, or their authority abridged. I will however report to you, fully, after I shall have informed myself, of the state of feeling &c, and will endeavor with Genl Arbuckle, to bring about a reconciliation. Respectfully Your Obt Servt
>
> Wm Armstrong Act Supt Westn Tery

War Department Files, A37.

Early in the forties, Opoeth-le-yo-ho-la posed as a trader in the Creek country. He was the partner of J. W. Taylor, a white man.

[*Footnote continued*]

the Creek commissioners had been working on for days was finally submitted for signature and the names of Motey Kennard, Echo Harjo, Chilly McIntosh, Samuel Checote [fol. 184] and many other less prominent Creeks were attached to it. On the twentieth, the general council approved it and more names were attached, that of Jacob Derrysaw being among them. On one or the other occasion, several white men signed. William Quesenbury, who was acting as Pike's secretary, Agent Garrett, Interpreter G. W. Stidham,[360] and W. L. Pike. Soon came the return of the travellers and much subsequent commotion. They expressed themselves as opposed to the whole proceeding, yet three of them found that, in their absence, their names had been forged[361] to the document that was passing as a treaty between the Creeks and the Confederate States. The three whose names were forged were, Ok-ta-ha-hassee Harjo (better known subsequently as "Sands" and who became in reconstruction days the great rival of Samuel Checote for the office of principal chief), Tallise Fixico, and Mikko Hutke. It is a matter of dispute what course Opoeth-le-yo-ho-la had taken[362] in the treaty conference but

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The company so composed failed, in 1843, "to give bond and license" and so Agent J. L. Dawson closed its store [Communication of J. L. Dawson, September 5, 1843, *War Department Files*, 11537].

[360] G. W. Stidham was probably a half-breed. Naturally, being the official interpreter, he signed as the interpreter and not as a member of the tribe.

[361] We the loyal Creek Indians represented by the Delegation now present, solemnly declare that the Treaty of July 10, 1861 was alone made by the rebel portion of the Creek Indians, and never was executed or assented to by the Union portion of the Nation, and is, not now, and never has been, obligatory upon them and the names to said treaty, of the loyal party, was a forgery—Land Files, *Indian Talks, Councils, etc.*, Box 4, 1865-1866; Commissioner of Indian Affairs, *Report*, 1865, p. 330.

[362] The document herewith given presents one view of the case:

> The undersigned Delegates from the Creek Nation would respectfully ask to make the following statement concerning the alliance between the said Creek Nation and the so-called Confederate States of America. To the end that the Creek Nation may be put upon a proper footing in the estimation

not what he did afterwards; for he became the intrepid [fol. 185] leader of the so-called "Loyal Creeks" and the foremost of the "Refugees."

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of your honorable body and that there may be no misapprehension on the part of the Government you here represent we beg leave to state

1st. The Alliance entered into by the Creek Nation with the Confederate Government was entered into voluntarily, and without the interference of any person or persons other than members of our tribe. In taking that step the assembled wisdom of the Nation in council, thought they were acting for the best interests of the Nation and of their posterity.

2d. Hopoethle Yoholo the far-famed leader of those members of our tribe who battled against us, was not at the time of the making of the treaty with Albert Pike Commissioner on the part of the Confederate States, a Chief, counsellor or head man in said tribe and had no voice in the council, he was however present at the making of said Treaty and give said Pike to understand that he fully concurred in the result of our deliberations. After the making of the Treaty Hopoethle Yoholo collected together his adherents, and for reasons entirely of a domestic character and in no wise connected with the National question at issue, withdrew from the country and assumed a hostile attitude. With this exception the Creeks were united as one man in action and were ever united as one man in principle on the National question then agitated.

3d. Although the Nation we represent would not attempt at this time to urge anything in palliation of the course of conduct they adopted in this matter, other than to ask your honorable body to esteem the error as one of the "head and not of the heart"—but we beg leave to state that at the time of the forming of the Alliance above referred to circumstances over which we could not possibly exercise control seemed to *demand* an adoption of the course taken. The protection always borne with the idea of allegiance, was taken from our Nation by the withdrawal of the United States forces from the Indian Territory. This movement left the Nations entirely without the support of the United States government, and had they desired to remain neutral or to take active measures on the side of the United States they could not possibly have done so without having their Country desolated, or by abandoning their homes. Surrounded by States, in a tumult of angry excitement attendant upon a dissolution of their connection with the United States, they were completely in the power of those States, with-

[fol. 186] Now that the history of the diplomatic relations between the Indian tribes and the Confederacy has been brought thus far, nothing seems more fitting than to return to the consideration of the Federal government and its representatives, its purposes, and its plans, beginning the account with the Indian Office and Commissioner Dole. Dole's early attempt to prevail upon the War Department to resume its occupation of Indian Territory was followed up by the convincing letter of the thirtieth of May in which he likened the Indians to the Union element in some of the border states and ended by throwing the full responsibility for any disloyalty that might appear among them [fol. 187] upon the Federal authorities; inasmuch as they had neglected and were still neglecting to give the support and protection that any ordinary guardian is bound in honor to give to his wards. Dole said in writing to Secretary Smith,

> . . . Experience has shown that the presence of even a small force of federal troops located in the disaffected States has had the effect to preserve the peace, encourage the friends of the Union, and induce the people to return to their allegiance.
>
> That this same result would be produced in the Indian country I cannot doubt, as they can have no inducement to unite with the enemies of the United States unless we fail as a nation to give them that protection guaranteed by our treaty stipulations, and which is necessary to prevent designing and evil-disposed per-

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out having United States forces to call to their aid or assistance. An alliance under such circumstances were [was] indispensible to the safety of the country. Viewing the matter in this light the Treaty was made, and once having linked our destiny with those of the Confederacy, we could not in honor betray our trust. In conclusion we beg leave to say that as long as events cannot be controlled by human wisdom and foresight and until an honorable adherence to promises made voluntarily, is dishonorable so long must we deem ourselves in one sense at least —guiltless of any criminality in this matter.—Land Files, *Indian Talks, Councils, etc., Box 4, 1865-1866.*

> sons from having free intercourse with them, to work out their evil purposes. . . [484]

Nothing came of Dole's application and thus was exemplified, as often before and often since, a very serious defect in the American administrative system by which the duty of doing a certain thing rests upon one department and the means for doing it with quite another. It is surely no exaggeration to say that hundreds and hundreds of times the Indians have been the innocent victims of friction between the War and Interior Departments.

But if the authorities at Washington were indifferent to the Indian's welfare, Senator Lane was neither indifferent to nor ignorant of the strategical importance of Indian Territory. With him the defence of Kansas and the means of procuring that defence were everything. Indian Territory and the Indian tribes came within the scope of the means. And so it happened that, while he was organizing his Kansas brigade, he commissioned[485] a man, E. H. Car- [fol. 188] ruth, who had formerly posed as an educator[486]

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[484] Commissioner of Indian Affairs, *Report*, 1861, p. 35; Indian Office, *Report Book*, no. 12, p. 176.

[485] Enclosed pleaz find a coppy of a Commission given by General Lane to E. H. Carruth together with copies of Letters sent by him to the various Tribes in the Indian Territory. I had an interview with Mr. Carruth yesterday. I find him a very Intelligent man and thougherly posted as to all matters relating to the Southern Indians he is very confident that most if not all the Southern Indians written to will Send deligations to Fort Scott as requested there ware three Creek Indians came up to se General Lane who came to Iola for Caruthe to go with them to General Lane which he did and they ware the barers of letters of which the enclosed are coppies. I am going to Fort Scott today and will make arrangements with Agent Elder to give the notice imediately on their arrival or Bring them to Humboldt. I shall try to secure the assistance of Mr. Caruthe tho he is now a voluntear in the Home Guards for protection. I very much feer the service required of me at the Sacks & Fox and Kaw agencies will take me to far off but will try to attend to all if possible—General Files, *Southern Superintendency, 1859-1862*, C1348.

[486] Manypenny to Dean, April 9, 1855 [Indian Office, *Letter Book*, no. 51, pp. 232-233].

among the Seminoles, to communicate with the various tribes for the purpose of determining their real feelings towards the United States government and of obtaining, if possible, an interview between Lane and some of their accredited representatives. The interview was to take place "at Fort Lincoln on the Osage or some point convenient thereto." [487]

Now a considerable portion of the Creek tribe was in just the right mood and in just the right situation to receive such overtures in the right spirit. That portion consisted of those who, after the treaty of July tenth had been negotiated in the manner already described, had rallied around Opoeth-le-yo-ho-la; and who, in a Creek convention that had been called for August fifth had declared that the chiefs, who had signed a treaty outside the National Council, had violated a fundamental law of the tribe and had thereby forfeited their administrative rank. The criticism applied to Motey Kennard and to Echo Harjo, the principal [fol. 189] and the second chief respectively. Kennard, as we have seen, was the leader of the Lower Creeks and Harjo of the Upper. A further division in Creek ranks was now inevitable and it came forthwith, the Non-treaty Party, made up mostly of Upper Creeks, proceeding to recognize[488] Ok-ta-ha-hassee Harjo (better known as "Sands") as the acting principal chief of the tribe. It also betook itself westward so as to be as much as possible out of the reach of the secessionists. When once in a position of at least temporary security, it despatched Mik-ko Hut-kee (White Chief), Bob Deer, Jo Ellis, and perhaps others to Washington to confer with the "Great Father." [489]

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[487] Extract from commission, dated Fort Scott, August 30, 1861, issued to Carruth by authority of J. H. Lane, Commanding the Kansas Brigade [*ibid.*].

[488] Commissioner of Indian Affairs, *Report*, 1865, p. 328.

[489] The loyal Creeks testified, in 1865, that they sent their "chief" and others to Washington and leave the reader to infer that the chief meant was "Sands;" but the accredited delegates were most certainly Mik-ko Hut-kee, Bob Deer, and Jo Ellis. These three men

[fol. 190] The Creek delegates, Mik-ko Hut-kee and his companions, went, on their way to Washington, northward

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signed their names, or rather attached their mark, to an address to the president of which the following is a certified copy:

SHAWNEE AGENCY, LEXINGTON, September 18, 1861.

SIR, we the Chiefs, Head Men, and Warriors, of the Creek Nation of Indians, in the Indian Territory, through our delegates, the undersigned desire to state to your excellency the condition of our people. Owing to the want of correct information as to condition of the Country and Government our people are in great distress. Men have come among us, who claim to represent a New Government, who tell us that the Government represented by Our Great Father at Washington, has turned against us and intends to drive us from our homes and take away our property, they tell us that we have nothing to hope from our old Father and that all the Friends of the Indian have joined the New Government. And that the New Government is ready to make treaties with the Indians and do all and more for them than they can claim under their old treaties. they ask us to join their armies and help sustain the Government that is willing to do so much for us. But we doubted their statements and promises and went to talk with the Agent and Superintendent which Our father has always kept among us but they were both gone and then some of our people began to think that Our Great Father had forsaken us and a very few joined the Army of the New Government and our people were in great trouble and we called a Grand Council of the Chiefs of Creeks, Cherokees, Chickasaws, Shawnees, Senecas, Quapaws, Kickapoos, Delawares, Weas, Peankeshaws, Witchetaws Tribes, and bands of Comanches, Seminoles, and Cadoes. And after a long discussion of the source of their troubles, decided to remain loyal to our Government and if possible neutral. The Chiefs went among their people (and as a general thing) counteracted the influence of the emissaries of the New Government. But these emissaries are still among us giving us great trouble, while our Government has no one who can officially represent itself. And we most earnestly ask that some person shall be sent here who shall meet the Chiefs of the above mentioned tribes in Council at some suitable place, and then make known to them the condition, policy and wishes of the Government so far as the interests of the Indians are concerned. If your Excellency should deem it best to comply with our request, we would suggest that Humboldt Allen County Kansas be the place for holding the Council. A notice sent to the Agent of the Shaw-

through Kansas, saw Superintendent Coffin[490] and, later, Lane's agent, E. H. Carruth. This was about the second week of September and Carruth was at Barnesville, Lane's headquarters. Carruth received the Creeks kindly, read [fol. 191] sympathetically the letter[491] that they brought

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nees, will immediately be forwarded by a messinger to the Chiefs. Very Respectfully, your Obedient Servants

WHITE CHIEF X his mark
BOBB DEER X his mark
JOSEPH ELLIS X his mark Interpreter

P.S. The Choctaws were not present at the Council and we have reason to feer that they have gone with the Southern Confederacy. It will take near forty days to notify the Chiefs and get them together after the notice gets at this place.

WHITE CHIEF X his mark

[490] They also saw Agent Abbot [Commissioner of Indian Affairs, *Report*, 1865, p. 330] and received new assurances from him.

[491] Perchance the same letter, either the original or a copy of which, Superintendent Branch transmitted to Dole along with an explanatory letter from Agent Abbott. The "talk" of the Creek chiefs was accompanied by a sort of Seminole and Chickasaw endorsement. Dole replied to the Creek and Seminole delegate appeals, November 16, 1861 [Indian Office, *Letter Book*, no. 67, pp. 78-79]. This is what the Creek chiefs said:

CREEK NAT. Aug 15, 1861.

Now I write to the President our Great Father who removed us to our present homes, & made a treaty, and you said that in our new homes we should be defended from all interference from any people and that no white people in the whole world should ever molest us unless they come from the sky but the land should be ours as long as grass grew or waters run, and should we be injured by anybody you would come with your soldiers & punish them, but now the wolf has come, men who are strangers tread our soil, our children are frightened & the mothers cannot sleep for fear. This is our situation now. When we made our Treaty at Washington you assured us that our children should laugh around our houses without fear, & we believed you. Then our Great Father was strong. And now we raise our hands to him we want his help to keep off the intruder & make our homes again happy as they used to be. . .

I was at Washington when you treated with us, and now White People are trying to take our people away to fight

from their distressed chiefs, Sands and Opoeth-le-yo-ho-la, assured the equally distressed delegates of the continued fatherly interest of the United States government, and sent them on their way, greatly comforted. It was while these Creek delegates were lingering at Barnesville that Carruth made a special effort to induce the southern Indians generally to send representatives for an interview with Lane. He wrote personally to Ross,[492] to the two [fol. 192] Creek chiefs,[493] and to the Wichita chief, Tusa-

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against us and you. I am alive. I well remember the treaty. My ears are open & my memory is good. This is the letter of Your Children by

OPOTHLEHOYOLA
OUKTAHNASERHARJO

The Seminoles also send the same word & the full Indians of the Chickasaws too send to the P—

The reply to this letter was made by Dole, November 16, 1861. See Indian Office, *Letter Book*, no. 67, pp. 79-80.

Pascofar the chief of Seminoles was present he was not able to come with us now but sent word. And if our Great Father want us we will come to see him.

MICCO HULKA JO ELLIS
ROB DEER

General Files, *Creek, 1860-1869*, B787.

[492] There is a delegation of the Creeks now at Gen'l Lanes Head Quarters.

We wish to see delegations from the tribes loyal to the U.S. Government. You will send us a delegation who will report to the Head Quarters of the Kansas Brigade where commissioners of the Government will meet and confer with them.

You are probably aware of the falsehoods resorted to by the enemies of the U.S. to induce the Indians to withdraw their allegiance from the Government. Could you come in person it would be grattifying to the Commissioners.—Letter of September 11, 1861 [General Files, *Southern Superintendency, 1859-1862*, C1348].

[493] Your letter by Micco Hutka is received. You will send a delegation of your best men to meet the Commissioners of the United States Government in Kansas.

I am authorized to inform you that the President will not forget you. Our armies will soon go south and those of your people who are true and loyal to the Government will be treated

quach,[494] and, in addition, wrote to the Seminole chiefs and headmen[495] and to the "loyal" Choctaws and Chickasaws.[496]

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[fol. 193] Determined not to allow themselves to be overpersuaded or intimidated by the secessionist element in their nation, the unionist Creeks, under Opoeth-le-yo-ho-la, had withdrawn from active intercourse with the rival faction and, resisting all attempts of Cooper and others to inveigle them into an interview that might result in compromise, they had encamped at or near the junction of the Deep and North Forks of the Canadian River. Cooper

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as friends—Your rights & property will be respected. The Commissioners from the Confederate States have deceived you they have two tongues.

They wanted to get the Indians to fight and they will rob and plunder you if they can get you into trouble. But the President is stil alive his soldiers will soon drive these men who have treacherously violated your homes from the land they have entered. When your Delegates Return to you they will be able to inform you when and where your monies will be paid those who stole your orphan funds will be punished and you will learn that the people who are tru to the Government which has so long protected you are your Friends.—Letter to Opoth-le-ho yo-ho, Ho-so-tau-hah-sas Hayo, dated Barnesville, September 11, 1861.—General Files, *Southern Superintendency, 1859-1862*, C1348.

The author's opinion is that the mistakes in spelling were made by the illiterate Coffin, who probably made a copy of Carruth's letters for transmission to the Indian Office. He may also have made a slight alteration in the date of the letter to the Creeks; for the original of the letter, bearing the date of September 10, 1861, was found in Opoeth-le-yo-ho-la's camp after the Battle of Chustenahlah, December 26, 1861 [*Official Records*, first ser., vol. viii, 25].

[494] *Official Records*, first ser., vol. viii, 26.

[495] In his letter to the Seminole chiefs and headmen, Carruth reminds them that he was with them when letters came from Pike and that Pike "is the man who has tried so hard to get your lands sectionalized" and asks, "who brought up a bill in Congress to bring your tribes under Territorial laws, Johnson of Arkansas. . . ."

[496] —*Ibid.*, 26.

resolved to attack them there and, for the purpose, gathered[515] together an effective fighting force of about fourteen hundred men, all Indians except for a detachment of Texas cavalry. On the fifth of November, Opoeth-le-yo-ho-la broke camp and took up the line of march for Kansas, hoping that, in Kansas, he and his followers would receive either succor or refuge. It has been estimated that Opoeth-le-yo-ho-la's force, at this time, was less than two thousand men and that it comprised, besides Creeks and Seminoles, some two or three hundred negroes. His traveling cortège was, however, very much larger; for it included women and children, the sick and the aged. Approximately half of the Creeks were on the move for pastures new. For many of them it was a second exodus.

Colonel D. H. Cooper reached the deserted camp of Opoeth-le-yo-ho-la on the fifteenth of November and, find-[fol. 194] ing his enemy gone and locating his trail, moved himself in a slightly northeasterly direction towards the Red Fork of the Arkansas. He came up with the unionist Creeks at Round Mountain on the night of the nineteenth and an indecisive engagement[516] followed, both sides claiming the victory. Under cover of darkness, Opoeth-le-yo-ho-la managed to slip away and crossed into the Cherokee country where there were plenty of disaffected full-bloods to give him sympathy. It is more than likely that they had invited him there and had prepared for his coming. Cooper did not attempt to pursue the Creek refugees, having been called back to the Arkansas line, there to wait in readiness to reënforce McCulloch should the Federals make a forward march southward from Springfield, as then seemed probable. But that danger soon passed, passed even before Cooper had had time to take the post indicated or to leave his own camp at Concharta, after a brief recuperation. He was now free to follow up the meagre advantage of the nineteenth.

The next opportunity to crush Opoeth-le-yo-ho-la came in the Battle of Bird Creek [Chusto-Talasah, Little High

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[515] *Daily State Journal* (Little Rock), Nov. 8, 1861.

[516] Colonel D. H. Cooper's "Report" [*Official Records*, first ser., vol. viii, 5].

Shoals, or the Caving Banks],[517] fought December 9, 1861. On the twenty-ninth of the preceding month, a part of Cooper's force had set out for Tulsey Town and an advance guard had been sent up the Verdigris in the direction of a place, called "Coody's Settlement," where Colonel John Drew with a detachment of his regiment of Cherokee full-bloods was posted. The orders were that Drew should effect a junction with Cooper's main force and, on December eighth they were all encamped on Bird Creek in the south-[fol. 195] western corner of the Cherokee Nation. At this juncture, word came that Opoeth-le-yo-ho-la wished to treat for peace and Major Pegg, a Cherokee, with three companions was sent forward to confer with him. They found the Creek chief, surrounded by his warriors and ready for battle. It was evening and Colonel Cooper had scarcely heard the news of the Creek determination to fight when a message came that four companies of Drew's regiment, horrified at the thought of fighting with their neighbors, had dispersed and gone over to Opoeth-le-yo-ho-la. The incident did not promise well for success on the morrow and the Battle of Bird Creek was another indecisive engagement, although the Creeks, eager and resplendent with their yellow corn-shuck badges, seem to have had all the advantage of position. Again they made their escape and again Colonel Cooper was prevented from following them, this time because he was exceedingly fearful lest the Cherokee desertion might have a lasting and disastrous effect upon the remaining Indian forces, particularly upon the small group that was all that was left of the original First Cherokee Mounted Rifles. Cooper's personal opinion was, that the defection was widespread among the Cherokees and that it would be sheer folly to start out after Opoeth-le-yo-ho-la until more white troops had been added to the pursuing force, by way both of reënforcement and of encouragement.

Instead, therefore, of continuing northward, Colonel Cooper drew off in the direction of Fort Gibson and, from that point, sent for aid to Colonel James McIntosh at Van

[517] Colonel D. H. Cooper's "Report" (*Official Records*, first ser., vol. viii, 7, 709).

Buren. He then occupied himself with his own troops and prevailed upon John Ross to rally[518] the Cherokees. It was now the nineteenth of December and the aged chief did [fol. 196] his best to keep his people true to the faith that the nation had pledged in the treaty of the seventh of October. He recalled to their minds the fact that it was, by all odds, the best treaty that the Cherokees had ever secured, the one that gave them the fullest recognition of their rights as a semi-independent people, and he might have added with sad, sad truth that it was the best that they could ever hope to get. He made no such pessimistic reflection, however, but concluded,

> It is, therefore, our duty and interest to respect it, and we must, as the interest of our common country demands it. According to the stipulations of the treaty we must meet enemies of our allies whenever the south requires it, as they are our enemies as well as the enemies of the south; and I feel sure that no such occurrence as the one we deplore would have taken place if all things were understood as I have endeavored to explain them. Indeed the true meaning of our treaty is, that we must know no line in the presence of our invader, be he who he may. . .[519]

Colonel Cooper then addressed[520] the Indians and, after him, Major Pegg;[521] but they were not convinced and many of them went home, positively refusing to march farther with the army.

Meanwhile Cooper's call for reënforcements had reached McIntosh[522] and, as the need seemed so urgent, McIntosh

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[518] Commissioner of Indian Affairs, *Report*, 1865, pp. 355-357.

[519] Extract from John Ross's address to Drew's regiment [Commissioner of Indian Affairs, *Report*, 1865, p. 356].

[520] Commissioner of Indian Affairs, *Report*, 1865, p. 357.

[521] —*Ibid.*

[522] McIntosh, at the time, was in charge of McCulloch's brigade, McCulloch having gone to Richmond to explain to the authorities there why he had persistently laid himself open to the charge of refusing to coöperate with Sterling Price in his many Missouri

[fol. 197] resolved to supply it and notified Cooper to that effect. Subsequently, he decided to take the field in person and to head a column, separate from Cooper's. What induced him to do this, nobody can well say. Cooper always felt that the incompleteness of the victory over Opoeth-le-yo-ho-la, which was soon to come, was mainly attributable to the divided effort of the attacking force. In the two former engagements, Opoeth-le-yo-ho-la's force, such as it was, untrained and miscellaneous, had greatly outnumbered the Confederate; but now the two were more equally matched in point of numbers and the chances of success were all on the southern side because of superior training and equipment, so Cooper was probably correct in his conjecture. McIntosh's excuse[524] for advancing precipitately and alone was, notwithstanding, very reasonable. The scarcity of forage made it expedient to march compactly; and the two generals had agreed, so McIntosh declared, when in conference at Fort Gibson, "that either force should attack the enemy on sight."

The privilege of attacking Opoeth-le-yo-ho-la fell, under this arrangement, supposing it was made, to McIntosh, who had been able to push on in advance of Cooper. The Battle of Chustenahlah was fought in the early afternoon of December 26, 1861, and ended in what seemed the complete defeat of the Creeks. McIntosh reported that, although their position was strong, they were forced to retreat

> To the rocky gorges amid the deep recesses of the mountains, where they were pursued by our victorious troops and routed in every instance with great loss. They endeavored to make a stand at their encampment, but their efforts were ineffectual, and we were

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ventures, planned subsequent to the Battle of Wilson's Creek. McCulloch's orders from the Confederate War Department were that he should guard the Indian Territory. Price's great idea was to occupy the Missouri River country. Had McCulloch gone northward with Price, he would, so he ably argued, have removed himself altogether from his base.

[523] *Official Records*, first ser., vol. viii, 11.

[524] —*Ibid*, 22.

[fol. 198] soon in the midst of it. The battle lasted until 4 o'clock, when the firing gradually ceased.[525] . .

And then the Creeks fled, leaving practically everything in the shape of property behind them. Cooper came up and detachments of his troops pursued them almost to the Kansas line. The weather was bitterly cold, provisions scarce, the country rough and bleak. The pursuit took the form of a seven day scout; but the Creeks, no matter how great their dispersion, were headed straight for Walnut Creek, Kansas.

Their coming was anticipated. Hearing of their approach, Superintendent Coffin had directed[526] all the agents[527] under his charge to report to him for duty at a place on the Verdigris River called Fort Roe[528] "about thirty-five or forty miles from Leroy and Burlington." It was Coffin's intention to meet the refugees upon their first arrival; but, as Commissioner Dole was expected soon to be at Fort Leavenworth, he thought it best to wait[529] and consult with him. It does not seem to have been recorded on just what date the first of the Indian refugees crossed the Kansas line, but they were very soon crossing in great numbers and, by the time Coffin finally reached them, their condition was truly pitiable. They took up their station on the bare prairies between the Verdigris and the [fol. 199] Arkansas Rivers and stretched themselves in al-

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[525] *Official Records*, first ser., vol. viii, 23-24.

[526] Commissioner of Indian Affairs, *Report*, 1862, p. 136.

[527] The agents were, George A. Cutler, Creek, Charles W. Chatterton, Cherokee, Isaac Coleman, Choctaw and Chickasaw, G. C. Snow, Seminole, and Peter P. Elder, Neosho River. Agent Elder did not report for duty.

[528] The Indian agents usually referred to it as "Fort Roe" but the military men, with a few possible exceptions, when meaning identically the same locality, spoke of "Roe's Fork." There is no such place as Fort Roe given in the *Lists of Military Posts, etc., established in the United States from its earliest settlement to the present time*, published by the United States War Department, 1902. That list, however, is far from being complete.

[529] Commissioner of Indian Affairs, *Report*, 1862, p. 138.

most hopeless confusion over about two hundred miles of country. Fortunately the land upon which they camped was Indian land, New York Indian land, and the few white men thereon were legally intruders and could not consistently object to the presence of the refugees. The numbers of the refugees were variously estimated. Starting with about forty-five hundred,[530] they increased daily and at an astonishing rate; for the exodus of the Creeks was but the signal for the flight of other tribesmen from Indian Territory, of all those, in fact, who were either tired of their alliance with the Confederacy or had never been in sympathy with it and were only too eager to take the first chance to escape from it.

The suffering of the refugees, due to destitution and exposure, was something horrible to think upon. Superintendent Coffin had little to give them. He appealed to General Hunter for an allowance from the army supplies and Hunter sent down his chief commissary of subsistence, Captain J. W. Turner, to do what he could to relieve the distress. Hunter also sent Brigade-surgeon A. B. Campbell; for it was not simply food and clothing, that were needed and roof shelter, but medical attendance. As soon [fol. 200] as possible, cheap blankets[531] were furnished and some condemned army tents. The journey northward had

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[530] In compliance with instructions from Major-General Hunter, contained in your order of the 22d. ultimo, I left this place on the 22d. and proceeded to Burlington, where I learned that the principal part of the friendly Indians were congregated, and encamped on the Verdigris river, near a place called Roe's Fork, from twelve to fifteen miles south of the town of Belmont. I proceeded there without delay. By a census of the tribes taken a few days before my arrival, there was found to be of the Creeks, 3,168; slaves of the Creeks, 53; free negroes, members of the tribe, 38; Seminoles, 777; Quapaws, 136; Cherokees, 50; Chickasaws, 31; some few Kickapoos and other tribes, about 4,500 in all. But the number was being constantly augmented by the daily arrival of other camps and families. . . .—A. B. Campbell, surgeon, U.S.A., to James K. Barnes, surgeon, U.S.A., medical director, Department of Kansas, dated Fort Leavenworth, February 5, 1862.

[531] These were purchased by Coffin, acting under the advice of Hunter [Dole to Smith, June 5, 1862, Indian Office, *Report Book*, no. 12, pp. 392-396].

been undertaken in the bitterest of cold weather. With a raw northwest wind beating in their faces,

> And over the snow-covered roads, they travelled all night and the next day, without halting to rest. Many of them were on foot, without shoes, and very thinly clad. . . In this condition they had accomplished a journey of about three hundred miles; but quite a number froze to death on the route, and their bodies with a shroud of snow, were left where they fell to feed the hungry wolves. . .
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> Families who in their country had been wealthy, and who could count their cattle by the thousands and horses by hundreds, and owned large number of slaves, and who at home had lived at ease and comfort, were without the necessaries of life.[532]

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[532] Extracts from Agent Cutler's *Report*, September 30, 1862. Various reports, more or less detailed, descriptive of the intense sufferings of Indian refugees in the first weeks of their sojourn in Kansas may be found in the *Annual Report* of the Commissioner of Indian Affairs for 1862, pp. 135-175. Those of Turner, Campbell, Cutler, and George W. Collamore are particularly good. Some of the reports originally accompanied Dole's *Report* of June 5, 1862 [Indian Office, *Report Book*, no. 12, pp. 392-396; Commissioner of Indian Affairs, *Report*, 1862, pp. 147-149; House *Executive Documents*, 37th congress, second session, vol. x, no. 132], which was prepared in answer to a House resolution, calling for information on the southern refugee Indians.

Collamore's *Report* of April 21, 1862 is to be found in manuscript form in General Files, *Southern Superintendency, 1859-1862*, C1602. Another report, most excellent in character, issued from the pen of special agent, William Kile, February 21, 1862. It is in Land Files, *Southern Superintendency, 1855-1870*, K107. There are also a few good accounts of the Creek exodus of 1861. One of them is a sworn statement, presented by Holmes Colbert in a letter, dated March 25, 1868, and authoritatively cited by Mix in an office letter to Secretary Browning, June 8, 1868 [Indian Office, *Report Book*, no. 17, p. 308].

Another account came from John T. Cox to W. G. Coffin under date of March 18, 1864, and, while not in the least detailed, is worth quoting because of its tribute of respect to the loyal Indians. It runs thus:

> Herewith I enclose a map of the route of retreat of the early Loyal Refugee Indians, under Apoth yo-ho-lo, in the Winter of 1861.

[*Footnote continued*]

[fol. 201] When, sometime in early December, Commissioner Dole heard of the resistance that the unionist Creeks were making to Colonel Cooper, he immediately applied [fol. 202] once more, through the Secretary of the Interior,

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With the facilities within my reach, for obtaining facts connected with that remarkable exodus, I am fully warrented in saying, that the history of the War does not furnish a parallel of patriotic devotion to the Union.

The Rebels had managed so adroitly during the administration of Buchanan, as to secure the appointment of, or favor of every Government Official, or Employee, within the limits of the South Indian Country, all sources of information were corrupted or poisoned. Postmasters deplored the fall of the Old Government, as already taken place. Indian Agents, and all others holding business relations with the several tribes, used every means in their power to discourage them and destroy their confidence in the Old Government, resorting to the grossest Misrepresentations, Bribery of Chiefs, Headmen, &c., Malfeasance and Robbery. Military Posts, Government Stores, Ordnance &c. &c. were surrendered or abandoned under color of the most dire military necessity, and the apparent tardiness of the Old Government to render them timely assistance, or in any way counteract those influences, left them without counsel, and without friends, and implied a total abandonment of the Indians. Yet under all the discouraging surroundings a large portion of the Creeks, Cherokees, Seminoles and others maintained their loyalty. The Chickasaws were divided in their Councils, and the Choctaws went over almost entirely to the Rebel Government.

In the month of March 1861, international councils were held, first at the Creek Agency, next at North Fork, without affecting very materially the fidelity of the Indians. But in the latter part of April, the Choctaws and Chickasaws gave in full adhesion to the Confederate Government. The remaining tribes were alternating between the Counsels of Apoth-yo ho-lo, McDaniel and others on the one hand, and a swarm of Rebel Commissioners on the other.

The Rebel Government was pushing forward the organization of Indian Regiments, under the McIntoshes, S'an Watie, Adair, Jumper, Smith and others, while the Conservative element, forming a Cherokee Regiment under Col. Drew, for armed neutrality, but in truth loyal to the Union, while Apothyo-ho-lo headed the hostiles, as they were termed by the Rebels.

In a Report dated Creek Agency C.N. Dec. 16th., 1861, addressed to the Hon. David Hubbard, Commissioner of Indian Affairs, Richmond, Va., the Creek Agent, Col. Garrett says, See Copy marked "A" (Garrett's report to Hubbard appears

to the War Department for troops sufficient to assert Federal supremacy south of the Kansas line, his immediate object being, the strengthening of the force then opposed to Cooper. At the moment, Lane's expedition was under consideration, Lane having managed to convince the Washington authorities, both congressional and administrative, that an expedition southward was absolutely necessary[533] for the protection of the frontier.

Somewhat earlier, in fact in the late autumn, the non-secession Indians of various tribes had made their own appeal for help. They had made it to the United States government and also, a little later on, to the Indian tribes of Kansas. Along about the first of November, a mixed delegation[534] of Creeks, Seminoles, and Chickasaws had made

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in another connection in the present work. It seems to have come into the Indian Office from two independent sources). I have noted this to show the attitude of the several tribes at the beginning of the Rebellion.

The principal object of this report is to call attention to the real claims of the Indians upon the Government, not only to sympathy, but compensation for services from the time they abandoned their homes and all they possessed, and took up arms in support of the Government.

Although they claim nothing of the kind, yet the moral effect of such a tangible recognition of their early services, would insure fidelity of all other tribes against any other future rebellion or disaffection against our Government.

The history of their destitution, and terrible sufferings in their pilgrimage of three hundred miles in mid-winter, is familiar to you and not necessary here to relate [General Files, *Southern Superintendency, 1863-1864*, C824].

[533] Others had reached that decision likewise. On the tenth of December, McClellan had written to Halleck, "I shall send troops to Hunter to enable him to move into the Indian Territory west of Arkansas and upon Northern Texas. That movement should relieve you very materially"—*Official Records*, first ser., vol. viii, 419. See also the letter of December 11, 1861 [*ibid.*, 428].

[534] It was to this delegation, I have no doubt, that the Shawnees sent their note of encouragement. It bears date November 15, 1861 and was issued from the Shawnee Agency, Johnson County, Kansas. Its inspiring passages are these:

Brothers, hold fast to the Union! Hold to your treaties! And now call upon the United States government to fulfill

[fol. 203] its appearance[535] at Leroy and, finding there the United States Creek agent, George A. Cutler, had consulted with him "in reference to the intentions of the Federal government regarding the protection due them under treaty stipulations." Cutler advised the Indians to talk the matter over with Senator Lane and accompanied them to Fort Scott, Lane's headquarters, for the purpose. Arriving there, they learned that Lane had gone to Washington and had left his command in charge of Colonel James Montgomery. Colonel Montgomery counselled with the Indians as Cutler had done and helped them to reach the decision that it would be best to proceed to Washington and lay their complaints before the Commissioner of Indian Affairs. At the same time, Montgomery notified[536] President Lincoln of their intention.

Still accompanied by Agent Cutler, the delegation resumed its journey, going by way of Fort Leavenworth. There they conferred[537] with General Hunter and left greatly strengthened in their resolution of proceeding to Washington; for Hunter, too, thought that such a trip might compel the government to realize the Indian's very real distress and its own obligation to relieve it. We are fain to believe that General Hunter personally believed in

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their treaty stipulations with you by protecting you in this your time of need, and save your country to you first, and then, by so doing, save the whole of the Indian country to the Union. . . . And now our advice to you is, go immediately to Washington City, lay your case before President Lincoln, state everything, and we assure you that he will protect you, and that immediately; we think that delay on your part will be ruinous to your people; we believe that your agent ought to conduct you there. Put your confidence only in the Union and you will be safe. . . .—Commissioner of Indian Affairs, *Report*, 1861, p. 45.

[535] Report of Agent Cutler, September 30, 1862 [Commissioner of Indian Affairs, *Report*, 1862, p. 138].

[536] Montgomery to Lincoln, November 19, 1861 [*ibid.*, 1861, p. 461].

[537] Hunter to Dole, December 1, 1861 [Commissioner of Indian Affairs, *Report*, 1861, p. 49].

the military necessity of securing Indian Territory even though he did do all he could to oppose the project of Senator Lane in the early months of 1862 and even though he did disapprove of the formation of the department of Kan- [fol. 204] sas and his own assignment to it instead of to that of Missouri, which would have been his preference. If he at any time to date had wavered[538] in his opinion as to the needs of the Indians and their legitimate claim upon the United States government for protection, Carruth's letter of November twenty-sixth ought to have settled the matter, unless, indeed, its rather savage tone had created prejudice instead of working conviction as was intended.

> . . . I have from the first believed it would be good policy to let loose the northern Indians, under the employ of government; it certainly would be better for the border States to have the Indian country for a battle ground than to have it remain a shelter for rebel hordes the coming winter. . . [539]

The visit of the Indians to Washington proved very opportune. By the twenty-seventh of December, they were back at Fort Leavenworth and considerably reassured. Superintendent Coffin had a council with them on the twenty-eighth "at the Fort to good satisfaction." He says of his interview,

> I gave them Presents of Pipes, tobacco, and Sugar, and they went on their way to Fort Scott rejoicing they seem to be in fine Spirits,[540] but are at a Loss what to

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[538] Note that Hunter, when writing to McClellan, December 19, 1861 [*Official Records*, first ser., vol. viii, 450], professed that, previous to the receipt of McClellan's letter of the eleventh, he had not known that it was expected of him that he should undertake an expedition for the defense of Indian Territory. He declared that Thomas' communication of November twenty-sixth, touching the matter, had been vague in the extreme.

[539] Extract from letter of Carruth to Hunter, November 26, 1861 [Commissioner of Indian Affairs, *Report*, 1861, p. 49].

[540] It seems a little surprising that they did depart from Fort Leavenworth in such good spirits; for, while there, they surely must have heard rumors of the final attack upon Opoeth-le-yo-ho-la.

[*Footnote continued*]

do for a living til Lanes Army goes down there into the Indian Territory they want very much to get Some of the Funds now due the Creeks. . .[541]

[fol. 205] A more pathetic appeal, and one more immediately telling in its effects, was that made to the brother Indians of Kansas. It came direct from Opoeth-le-yo-ho-la and when it reached the Delawares found in them a ready response. It invited their coöperation[542] in the war and asked for men and ammunition.[543] This is the Delaware reply:[544]

We are much rejoiced to receive your letter by James McDaniel[545] and David Balon. Our Agent has sent it

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Agent Cutler tells us that he heard of the exodus a few days after his return to Kansas with the delegation. He had then left Leavenworth, however, for he says farther on in his letter that he went back there to confer with Coffin as to what should be done.

[541] Extract from letter of Coffin to Dole, December 28, 1861 [General Files, *Southern Superintendency, 1859-1862*].

[542] See letter of Mix to F. Johnson at the Delaware Agency, Quindaro, Kansas, dated January 22, 1862, acknowledging Johnson's letter of January fourth, which enclosed

> A copy of the reply of the Delaware Chiefs in Council to the letter of the Creek Chief O-poeth-lo-yo-ho-la, inviting their coöperation against the rebel States. . .—Indian Office, *Letter Book*, no. 67, pp. 271-272.

[543] On the 1st inst., I mailed you the letter of Opoth-la-yar-ho-la Muscogee Chief to the Delawares asking for men and ammunition. On the 2nd. inst. the Delaware chiefs in Council returned the following letter in answer to Opoth-la-ho-la. . .—F. Johnson to Dole, dated Quindaro, Kansas, January 4, 1862 [General Files, *Delawares, 1862-1866*, J543].

[544] John Connor, Head Chief, Ne-con-he-con, Sur-cox-ie, Chas. Journeycake, Assistant Chiefs, to Oputh-la-yar-ho-la, Muscogee Chief Warrior and our loyal Grand Children dated Delaware Nation, Kansas Jan. 3rd 1861.

[545] James McDaniel seems to have been a Cherokee. On April 2, 1862, Agent Johnson reported to Dole that forty-one Delaware Indians had returned destitute from the Cherokee country and that he had given them assistance and also "a refugee Cherokee chief,

[fol. 206] to our great Father, the President, "at Washington," and to Gen. Hunter at "Fort Leavenworth."

James McDaniel." This idea is further borne out by the following letter:

Office of U.S. Agent for Cherokees
Tahlequah, Ind. Ter. April 7, 1873

HON. H. R. CLUM, Acting Commissioner of Indian Affs

SIR: I beg leave to call your attention to the fact that in the fall and winter of 1861 Opothleyoholo a Creek and James McDaniel a Cherokee placed themselves at the head of the loyal Creeks, Seminoles, Cherokees & others. Unsustained by any U.S. forces they gathered on Bird Creek, in this Nation, to resist rebel conscription into their army. They tried to avoid a fight, to make their way peacably to the union army in Kansas, by a far western route. But Gen. Douglas H. Coopper, & Gen. Stand Watie, with troops from Texas, & Arkansas, & with rebel Cherokees, Creeks, Choctaws &c pressed upon them, & attempted to bring them into subjection to the Southern Confederacy. They adhered to their loyalty. Fought the rebel forces in three or four battles. At first vanquishing the rebel forces, but finally were overcome, & compelled to flee to Kansas in mid-winter, with women & children. In Kansas these men were organized into regiments, & on arriving in the Cherokee Nation were largely reinforced by their friends here, & in the Creek & Seminole Nations.

I have made this statement so that you may see the situation in which these men are placed, & judge intelligently.

Now I wish to know if men wounded in those engagements, under Opothleyoholo & James McDaniel, while fighting against the rebels, & the widows of those who were killed, & those who were otherwise disabled in those fights, & in the subsequent flight, are entitled to the benefits of pension laws. Can they be pensioned under existing laws?

If not, can you, through the Secretary of the Interior, prevail on the President to have the matter presented to the next Congress, with a view to having these persons placed on the rolls of the pension office. I need say nothing of the propriety of the Government rewarding as far as possible, such acts of loyalty & voluntary fighting for the Government by full blood Indians—when all the influence & power of faithless Indian Agents, & Superintendants, & the Southern army from Texas & Arkansas, & the more wealthy & educated mixed blood Indians, were arrayed against them. It should be rewarded, as far [as] practicable, as an incentive to like faithfulness in any emergency that may arise in the future. I have the honor to be Very Respectfully Your Obdt. Servant

JOHN B. JONES, U.S. Agent for Cherokees

It gives us great pleasure to hear that you are good and true friends to the President, and to the Government of the United States. We hope you will continue to be their friend. If bad men of the South ask you to go to war against the President, stop your ears, don't listen to them, they are your worst enemies, they are trying to destroy you and the Country.

Grand Children it does our hearts good, we rejoice to hear of the victories you have gained over your enemies of the Government under your brave leader Oputh-la-yar-ho-la.

Grand Children we are ready and willing to help you. Our brave Warriors are ready to spill their Blood for you, and are only waiting to hear from our great Father at Washington, we have asked of him the privaledge of going to your assistance, and hope that our request will be granted, we don't wish to go to War against the wishes of our great Father the President. We have heard that the President will soon have a [fol. 207] large Army in the Indian Country to protect you, that he has ordered Gen. Lane to march to your relief. We are confident that our great Father is able and will protect his red children—Grand Children we pray to the "great spirit" to protect you and keep you out of the hands of the bad men of the South, who are trying to destroy you and the Government—We have no fears as to the result of this war—the President has large Armies in the field that will conquer and punish the Rebels—We are proud of our Muscogee Children.

The United States government had already determined upon an expedition to the Indian country and, yielding to the importunities of Senator Lane, who represented General Hunter as in full accord with himself in the matter, had decided to use the Kansas Indians in the making up of the attacking force. It was well that the Indians had manifested a readiness to fight and that the Delawares, particularly, had overcome their previous aversion. The first official record of the fact that the decision to use the Kansas Indians had been reached appears to be a com-

munication[546] from Assistant Adjutant-general E. D. Townsend to Surgeon-general C. A. Finley, under date of December 31, 1861, notifying him that medical supplies would soon be needed for a force of about twenty-seven thousand men, about four thousand of whom were to be Indians, which was to be concentrated at an early day near Fort Leavenworth. On the third of January, Lane wrote[547] to Hun- [fol. 208] ter, informing him, as if at first hand and semi-officially, of the new plan. It is not to be wondered at that General Hunter took offence at the officiousness and presumption Lane displayed. In point of fact, it was a clear case of executive interference.

Now that it had, to all appearances, gained a long-desired object, the Indian Office lost no time in lending the War Department its hearty coöperation. Commissioner Dole was especially enthusiastic and, under instructions from Secretary Smith, prepared to go out to Kansas himself to help organize the Indians for army service. He also sent particulars[548] of the new movement to Superin-

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[546] *Official Records*, first ser., vol. viii, 576.

[547] WASHINGTON. D.C. January 3, 1862.

MAJOR-GENERAL HUNTER, Commanding Kansas Department:

It is the intention of the Government to order me to report to you for an active winter's campaign. They have ordered General Denver to another department. They have ordered to report to you eight regiments cavalry, three of infantry, and three batteries, in addition to your present force. They have also ordered you, in conjunction with the Indian Department, to organize 4,000 Indians. Mr. Doles, Commissioner, will come out with me. J. H. LANE.

Official Records, first ser., vol. viii, 482.

[548] It being the intention of the Gov't of the United States to take into its military service 4000 Indians from the borders of Kansas and Missouri, to be organized under Major Genl Hunter, you are hereby made acquainted therewith. The different Agents in your superintendency will be instructed direct from this Office to use their best endeavors to engage the above number of Indians, taking care that those so engaged are capable of good service and are well affected towards this Government.

All the operations in this behalf should be conducted with dispatch and as much secrecy as the nature of the measure will admit of. [*Footnote continued*]

tendent Branch and a circular letter[548] to the agents of the central superintendency, detailing the advantages that would accrue to individual Indians should they enlist. Dole wrote these letters on the sixth of January and was then expecting to be in Leavenworth City for the making of final arrangements eight or ten days "hence." He did not man- [fol. 209] age to get away, however, quite so soon; but the agents went to work immediately and, even before Dole arrived in Kansas, Agent Farnsworth, who had always been rather too eager for Indian enlistment, was able to report[550] the initial steps taken. By the twenty-first of January,[551] Dole was well on his way west. He reached

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I understand that the Government proposes to equalize the pay of these Indian volunteers with that of other volunteers, but giving the chiefs an additional compensation. Each man will receive a blanket, and those not having arms of their own will be provided by the Government. Their subsistence will be the same as that provided in Revised Regulations No. 5, Section 39 of this Bureau, or the army subsistence, whatever ' at may be. Where any of the Indians, thus engaged, shall die or be killed whilst in service, their pay will be given over to their families—Indian Office, *Letter Book*, no. 67, pp. 211-212.

[549] —*Ibid.*, 215-216.

[550] Farnsworth wrote on the 21st, acknowledging Dole's letter of the sixth and saying,

Its contents has been explained to two trusty Indians, who will keep the matter entirely secret until the time for public action comes. I have sent for the Indians to come in. I think they will all be here by the 30th or 31st of this month. I will enroll them as soon as possible. I think I shall be able to enlist about 150 vigorous warriors . .—General Files, *Okapoo, 1855-1862*, F335.

[551] Your communication to this office of the 31st ..cember last has been received enclosing a letter which was brought to you by .. messenger from the South, as you were holding a Council with the Delaware Chiefs of your Agency, and which letter you desired to be laid before the President of the United States. Your communication also represented the readiness of the Delawares and all the other Western tribes to engage in military service on the side of the Government against the rebel States.

With reference to all these Subjects, you will have an opportunity of conferring with the Commissioner of Indian Affairs

Kansas in due season and there learned[552] for the first time, that Opoeth-le-yo-ho-lh had been completely overwhelmed, that the refugees were on the Verdigris, and that General Hunter was subsisting them. This was doleful news, indeed, and made the project of a southern expedition seem more and more expedient.

General Hunter had done the best he could to relieve the awful sufferings of the refugees; but, on the sixth of February, he was obliged to inform[553] Dole that he could do no more, that he had practically reached the end of his

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(who has perused your letter in person) at Leavenworth City, for which destination he left this City on Sunday last on public business.—CHARLES E. MIX, acting commissioner, to F. Johnson, January 21, 1862 [Indian Office, *Letter Book*, no. 67, p. 268].

[552] Commissioner of Indian Affairs, *Report*, 1862, pp. 26, 147-148.

[553] I have the honor to inform you that Capt. J. W. Turner, Chief Commissary of Subsistence of the Department, has just returned from the encampments of the loyal Indians, on the Verdigris river, and in its vicinity. Having made arrangements for subsisting these unfortunate refugees until the 15th day of the present month.

In the neighborhood of Belmont and Roe's Fort, there were, at the time Capt. Turner left, about four thousand five hundred Indians, chiefly Creeks and Seminoles. But their number was being constantly augmented by the arrival of fresh camps, tribes and families.

Their condition is pictured as most wretched—destitute of clothing, shelter, fuel, horses, cooking utensils and food. This last named article was supplied by Capt. Turner in quantities sufficient to last until the 15th instant after which time, I doubt not, you will have made further arrangements for their continued subsistence.

In taking the responsibility of supplying their wants until the Indian Department could make provision for their necessities I but fulfilled a duty due to our common humanity and the cause in which the Indians are suffering. I now trust and have every confidence that under your energetic and judicious arrangements these poor people may be supplied with all they need after the 15th instant, on which day the supplies furnished by Capt. Turner will be exhausted.

I make no doubt that provision should be made for feeding, clothing and sheltering not less than six thousand Indians, and possibly as high as ten thousand, on this point however, you are doubtless better prepared to judge than myself. I only

[fol. 210] resources, and that, after the fifteenth of February, the whole responsibility of subsisting the destitute Indians would have to fall upon the Interior Department. Dole was almost at his wits' end. He had no funds that he could use legitimately for the need that had arisen. It was a case of emergency, however, and something certainly had to be done. Before the fifteenth of December arrived, ad-[fol. 211] ditional reports[554] came in from Superintendent Coffin, detailing distress. Under the circumstances it was necessary to act quickly and without congressional authorization. Dole telegraphed[555] to Secretary Smith,

> Six thousand Indians driven out of Indian territory, naked and starving. General Hunter will only feed them until 15th. Shall I take care of them on the faith of an appropriation?

He received a reply[556] that should have been dictated, not so much in the spirit of generosity, as of simple justice:

> Go on and supply the destitute Indians, Congress will supply the means. War Department will not organize them.

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wish to urge upon you the necessity for prompt measures of relief.

P.S. Copies of the reports made by Capt. Turner and Brigade Surgeon Campbell will be furnished to you by tomorrow's post, in view of the urgency of this case, and the fact that these Indians cannot be supplied any further than have been done from the supplies of the army, I send one copy of this letter to Topeka and the other to Leavenworth City. Fearful suffering must ensue amongst the Indians unless the steps necessary are promptly taken.

This letter was forwarded by Edw. Wolcott, at Dole's request, to the Indian Office [General Files, *Southern Superintendency, 1859-1862*, W513].

[554] Coffin to Dole, dated Fort Roe, Verdigris River, Kansas, February 13, 1862 [General Files, *Southern Superintendency, 1859-1862*, C1526]; Snow to Coffin, February 13, 1862 [General Files, *Seminole, 1858-1869*].

[555] Commissioner of Indian Affairs, *Report*, 1862, p. 148.

[556] —*Ibid.*

With this approbation in hand, Dole went to work, purchased sufficient supplies on credit, and appointed[557] a special agent, Dr. William Kile of Illinois, who had been commissioned[558] by President Lincoln to act on Lane's staff and was then in Kansas as Lane's brigade quartermaster, to attend to their distribution. Meanwhile, the attention of Congress had been called to the matter and a particularly strong letter of Dole's, describing the utter misery of the exiles, was read in the Senate February 14, in support of a joint resolution for their relief.[559] It was intended originally to apply only to the loyal Creeks, Seminoles, and Chickasaws but had its title changed later so as to make it include the Choctaws. On the third of March, Congress passed[560] an act providing that the annuities of the "hostiles," Creeks, Chickasaws, Seminoles, Wichitas, and Cherokees, should be applied, as might be necessary, [fol. 212] to the relief of refugees from Indian Territory. It was expressly stipulated in this enactment[561] that the money should not be used for other than Indian Territory tribes.

Secretary Smith's telegram, as the reader has probably already observed, had given to Dole a small piece of information that was not of slight significance, signifying as it did a change of front by the War Department. The War Department had rescinded its former action and had now refused to organize the Indians for service. The objections to Lane's enterprise must have been cumulative. Before the idea of it had embraced the Indians and before it had become so closely identified with Lane's name and personality, in fact, while it was more or less a scheme of

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[557] Dole to Dr. Kile, February 10, 1862 [Indian Office, *Letter Book*, no. 67, pp. 450-452].

[558] Commissioner of Indian Affairs, *Report*, 1862, p. 148.

[559] *Congressional Globe*, 37th congress, second session, p. 815.

[560] United States *Statutes at Large*, vol. xiii, 562.

[561] It was, however, the beginning of a great deal of graft and misuse of government funds. Citizens of Kansas, otherwise reputable, prepared to reap a rich harvest, and government officials were

McClellan's, Hunter had interposed[562] objections, but purely on military grounds. His force was scarcely equal to a movement southward. Subsequently, Halleck interposed objections likewise and his reasons,[563] whatever his motives may have been, were perfectly sound, indeed, rather alarmingly so, since they broadly hinted at the miserably local interests involved in the war in the west and the gross subordination of military policies to political. * * *

[fol. 213]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 10

IX. THE EARLIER OF THE RECONSTRUCTION TREATIES OF 1866

The Fort Smith Council had resulted in nothing more than the establishment of formal peace between the government at Washington and the several nations of Indian Territory; but it would have been all-sufficient for the resumption of the old-time relations between guardian and ward had the United States authorities been disposed to act magnanimously or even justly in the premises and to take their due share of responsibility for the original Indian defection, since Federal troops had, under orders, abandoned the region at the first threat of war and white agents, holding office by Federal appointment, had directed Indian thought towards secession and, repudiating alle-

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not at all behindhand in the undertaking. Presumably, immediately upon the departure of Hunter's commissary from Fort Roe, the Indians began to get into the debt of the settlers and the sum of the indebtedness soon mounted up tremendously. Coffin again and again urged payment [Coffin to Dole, May 12, 1862], so did Colonel C. R. Jennison of the Seventh Regiment Kansas Volunteers, and so did General Blunt.

The act of March 3, 1862, reinforced by that of July 5, 1862 [United States *Statutes at Large*, vol. xii, 528] was re-enacted, in whole or in part, each year of the war [Act of March 3, 1863, United States *Statutes at Large*, vol. xii, 793; Act of June 25, 1864, *ibid.*, vol. xiii, 180]. In addition, special appropriations were made, like that of May 3, 1864, for the refugees.

[562] Hunter to Thomas, December 11, 1861 [*Official Records*, first ser., vol. viii, 428]; McClellan to Hunter, December 11, 1861 [*ibid.*].

[563] Halleck to McClellan, January 20, 1862 [*ibid.*, 509-510].

giance to the Union themselves, had lured the red men on. Unfortunately for the national honor, however, the Indian land was coveted. So good an opportunity for revoking the agreements of earlier years, made when the Indians were stronger than now, more unquestionably in the right, was not to be lost. The Homestead measure was law.[560] Settlers were already proving its efficacy in the acquirement of homes and farms easily and surely. The country was bound to fill up rapidly. Then too the era of gigantic railway enterprises and of equally gigantic government land grants to would-be capitalists was just beginning. The future location of freedmen had to be considered. These and many other things determined the course that [fol. 214] Harlan and his confréres, Cooley and Sells, all western men from the single state of Iowa, were bent upon pursuing.

The Fort Smith Council had closed its sessions with the intention of continuing negotiations later on in Washington. Only too well did the Indians comprehend that their fate was hanging in the balance. Its main features had yet to be decided. The loyalists among them feared the worst, yet had every reason, in justice and in law, to hope for the best. The secessionists, keener than the rank and file, grasped the situation accurately and prepared to turn it to their own advantage. Only because of the apostasy of these men had the present predicament come. If they personally could emerge from it unscathed, with fortunes relatively unimpaired, they cared little what might befall their late hostile and now resentful tribesmen. The Indians in a national way were doomed to suffer and nobody appreciated that fact more completely than did those who had made spoliation seem a justifiable measure.

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[fol. 215] In December, 1865, the Indian Office, impatient of a too prolonged delay, took steps to secure, under duress if necessary, the renewal of treaty negotiations. The Creeks, instructed from Washington, appointed as del-

[560] See Act of May 20, 1862 (12 *United States Statutes at Large*, 392-394) and Amendatory Act of March 21, 1864 (*ibid.*, vol. 13, pp. 35-36).

egates three of their head chiefs, Ok-tars-sars Harjo, or Sands, the successor of Opoethleyoholo, Coweta Meho (Cow-e-to-me-co) and Cot-cha Chee (Che-chu-chee). They were all of them of the northern persuation; but, whether selected by accident or by design cannot be positively asserted, since the Creeks had ostensibly buried the hatchet. By the majority party, at all events, the delegates were regarded, not as partisan, but as national representatives.[372] The Seminoles were similarly summoned to action by the government and peremptorily. Their selection was from chiefs likewise, heads of bands, John Chupco, or Long John, Principal Chief, Cho-cote Harjo, Foos Harjo, and John F. Brown.

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[fol. 216] Misrepresentation as to the nature and source of Seminole property rights was not the only or the most serious offence of the sort of which the commissioners were guilty. At the beginning of the preamble, they cited the *liability* to forfeiture and, towards its close, the *liabilities* in satisfaction of which a cession of lands might be demanded. To understand the criminal intent of the authors, their two citations must be brought into the closest juxtaposition possible. "Whereas the Seminole Nation made a treaty . . . and thereby incurred the liability of forfeiture of all lands and other property . . . and whereas the United States, in view of said treaty of the Seminole Nation . . . and the consequent liabilities of said Seminole Nation . . . " The two references were to one and the same delinquency; but whereas, *liability* in the sense in which it was used in [fol. 217] the phrase, "liability to forfeiture" betokened exposure only, a more or less probable contingency, *liabilities* implied debts actually contracted: Now the commissioners had no legal basis whatsoever for the impression of culpability which they were intending to convey. Congress had indeed enacted that should the president see fit he might by proclamation declare the lands of the seces-

[372] The treaty conveys an erroneous impression in referring to them as "delegates at large," and to D. N. McIntosh and James Smith as "special delegates of the Southern Creeks." (Kappler, vol. ii, p. 931).

sionist Indians forfeited; but neither Lincoln nor Johnson had moved in the matter, most likely because of the overwhelming evidence obtainable that the Indians had been imposed upon and had never, at their worst, acted as unified bodies. They owned their lands, not as individuals, but as tribes. Lincoln, at least, would have appreciated the crass injustice of invalidating the title of an entire tribe when half or more than half of its members had, to the best of their ability, been loyal. In the absence of a presidential proclamation of forfeiture, the title of the Indians remained as good and as complete as it had ever been.

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[fol. 218] The treaty with the Creeks was more difficult of procurement[607] than had been either of the others and it

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[607] In its original form, the Creek treaty was apparently one of the very first to be drafted. The delay in its definite procurement was chiefly caused by differences between the northern and southern representatives. The northern refused to recognize the southern as in any sense official and Agent J. W. Dunn, who with other agents like Harlan and Reynolds had been in Washington since January engaged in the business of treaty-making (Cooley to R. W. Taylor, First Comptroller of the Treasury, August 27, 1866, O.I.A., *Letter Book*, no. 81, p. 262), endorsed their view (Dunn to Sells, May 10, 1866, O.I.A., General Files, *Creek*, 1860-1869). Prior to the time when the Indian Office summoned the tribe to send delegates, a meeting had been held "on Scipio place" on which occasion Sands, the recognized leader of the loyal element, was authorized to go to Washington at the head of a delegation (Loyal delegates to Cooley, April 21, 1866, *ibid.*). This was on November 5, 1865. Later, in December, came the order from Washington and the full delegation was selected. In February, when Dunn with this delegation was in Fort Smith, *en route* for Washington, he telegraphed to Cooley, inquiring if he should furnish transportation to D. N. McIntosh and James M. C. Smith, who were intending to be present at the negotiations (Dunn to Sells, May 10, 1866, *ibid.*). He was answered in the affirmative; but the circumstance "was not intended to be interpreted that they were looked upon as official delegates."

Almost at the outset, however, the southern men made their presence felt and interjected their opinions into the treaty discussions. March fifth, they asked for an opportunity to read the treaty as drafted on the third in order that they might see how it affected the rights of the secessionists (McIntosh and Smith to Cooley, March 5, 1866, *ibid.*). The request was complied with

[fol. 219] was the claim for indemnity that proved the great stumbling-block in the course of its negotiation. The treaty was defined as one of "cession and indemnity." [fol. 220] For once the Indians were striving for exactness in terminology. In most respects the provisions of the

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and in a manner and with a result such as can be gleaned from the following letter from Dunn to Cooley, March 15, 1866 (*ibid.*):

> "On the 9th inst you furnished me a copy of the treaty lately concluded between the U. S. Government and the Creek Nation for the inspection of Col. McIntosh and Capt. Smith, who had lately arrived here as delegates from the disloyal portion of said Nation and who were anxious to make amendments to the treaty provided it could be done with the consent of those who had made it.
>
> "Messrs McIntosh, Smith & myself met the delegates who had made the treaty at their rooms at the Union Hotel at the date aforesaid when the parties had a free & friendly talk in relation to the treaty and their troubles for the last four years.
>
> "The delegates who had made the treaty refused the right of McIntosh & Smith to act with them, saying that they alone were authorized to make a treaty, that they had made one, the best that could be made situated as they were, that they were satisfied with it, and that they presumed the U. S. Government was, and that they would regard any interference in what had been done on the part of McIntosh & Smith as unkind & without authority—And here the conference ended . . ."

Their purpose defeated, McIntosh and Smith addressed themselves directly to the United States commissioners, Cooley, Sells, and Parker, and enumerated their objections to the treaty as it then stood, March 18, 1866. In brief, they opposed more particularly these matters: their own exclusion from the treaty-making, the confiscation of property, the recognition of former negro slaves as the equals of the Creeks politically, and the jurisdiction of congress. With regard to the last-named, they were ready to say that they were "not opposed to a proper and safe organization of the Indian Country into a Territory, giving due consideration and weight to the rights and welfare of the Indians." The same objections, a little better stated, perhaps, were, on March 31, 1866, embodied in an address to the president.

It would appear, although the dates of some of the documentary evidence is a little confusing, that a new draft of the Creek treaty was made and, on May 8th, submitted to McIntosh and Smith; but it failed to meet with their approval (McIntosh and Smith to Cooley, May 9, 1866, O.I.A., General Files, *Creek*, 1860-1869; Cooley to Harlan, May 18, 1866, *ibid.*, *Report Book*, no. 15, p. 286). On the eleventh, Harlan himself wrote to them, asking if they

treaty were made to resemble rather closely those of the Seminole. They registered the same insistence upon the thought that the Creeks had incurred liability of forfeiture because, in entering into an alliance with the Confederate States, they had "ignored their allegiance to the United States and unsettled the treaty relations" with that government. The confounding of liability to forfeiture with liabilities made its appearance again despite the fact that Cooley had had his attention called to the very evident discrepancy between the two, the former indicating a contingency, the latter, an accomplished fact.

By the now familiar device, the omission of a guaranty clause, the United States commissioners cleverly avoided fixing upon their country the responsibility for protection should another civil war occur. They forced the acknowledgment of tribal amnesty and pledged to individual Indians the benefaction of federal. As was the case in all the other treaties, the very words of the Thirteenth Amendment to the United States constitution were inserted into the treaty, which meant that the institution of slavery together with any other form of involuntary servitude except as a punishment for crime was to be forever abolished.

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would be willing to sign if the preamble be changed. Their reply was,

> ". . . Our chief objection to that treaty grows out of the fact that in the title and in the body—not in the Preamble—of that instrument, the majority of the Creek people are practically ignored and their rights confiscated, and as that objection, in our opinion, was paramount to all others, we considered it—and still consider it—useless to attempt to discuss minor details, until the main difficulty is disposed of by the recognition of the great body of the Nation, and of their right to be heard in the settlement of questions affecting their very existence . . ." (McIntosh and Smith to Harlan, May 14, 1866, I.D. Files, Bundle, no. 56).

Another attempt to re-draft the Creek treaty was made in June and completed June 14th (Cooley to Otto, June 14, 1866, O.I.A., *Report Book*, no. 15, p. 325); but, in the great essentials the old remained unaltered. In the case of the Creeks, the government had found the unionist element the more pliable and had worked with it to the undoing of the tribe. In the next few years, Creek troubles multiplied enormously and they traced themselves, upon investigation, to the reconstruction treaty of 1866.

The cause, invariably found attached, "whereof the parties shall have been duly convicted," had an interesting addition, "in accordance with laws applicable to all members of said tribe." It was undoubtedly intended as a protection for the freedmen against civil and judicial discrimination. Other safeguards for the freedmen there were and not the least of them the provision exacted of the Seminoles that the [fol. 221] blacks, whether ex-slaves or new immigrants, should be eligible to full membership in the tribe, be regularly adopted by it, and made competent to participate with native citizens in all its rights and privileges, "including an equal interest in the soil and national funds."[608]

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[608] Against this provision in all its stages, the southern Creeks most vigorously protested. McIntosh and Smith, in a letter to Harlan, May 22nd, said,

> "We cannot but think that you are disposed to require more for the freedmen than is just or reasonable—more than the whites have done or propose to do anywhere—and more than has been required of the Choctaws and Chickasaws in their behalf.
>
> "We feel certain that to give them an equal interest in either annuities or soil would be an ill-advised step, calculated to create a prejudice against them in the minds of our people. So far as we are concerned, we are willing to give them all the rights, privileges, and immunities of our own citizens—with the right to occupy and cultivate forty, or even 80 acres of land—in other words, that quantity to be held on the same terms under which our own people hold their possessions . . ." (O.I.A., General Files, *Creek*, 1860-1869).

The Creeks did not altogether live up to the agreement regarding the freedmen, which was not surprising, especially when the fact be realised that the Indian Office and the Interior Department made very peculiar rulings in the premises. For instance, the Commissioner of Indian Affairs, on one occasion, ruled that "negroes who become citizens of the Creek nation, under the provisions of the Creek treaty of 1866, are not Indians within the meaning of the Intercourse Act and are subject to the jurisdiction of the U.S. courts." (O.I.A., *Report Book*, no. 20, p. 350). Secretary Delano reversed this decision (Delano to the Commissioner of Indian Affairs, February 2, 1872, O.I.A., Land Files, *Creek*, Box 45). A clause in the Indian Appropriation Act for 1868 authorized the withholding of Creek money until the freedmen should be provided for (See Taylor to Browning, August 10, 1868, O.I.A., *Report Book*, no. 17, p. 406. On the same subject, see *Report Book*, no. 18, pp. 16, 17).

The land cession made by the Creeks on this occasion was an extensive one, approximately three million two hundred and fifty thousand five hundred and sixty acres. It comprised the entire western half of their tribal domain. Out of its extreme southeastern corner, the Seminoles had already been provided for, a tiny section of the whole. The retained eastern half of their old reserve the Creeks [fol. 222] were assured that they might hold henceforth in perpetuity. Probably, upon no other condition, could they be prevailed upon to surrender anything. The sale price of the cession was fixed at thirty cents an acre and, out of the amount realised, that is, out of the Creeks' own funds, the United States government generously undertook to pay two hundred thousand dollars per capita unless the President should otherwise direct, for reconstruction work "to enable the Creeks to occupy, restore and improve their farms, and to make their nation independent and self-sustaining." In much of this there was the spirit of a self-denying ordinance; but just the same the Creeks would have been better pleased had their Great Father undertaken a little reparation work on his own account. He might, for example, have advanced the comparatively small sum, two thousand dollars or less, with which the losses sustained by missionary establishments were to be made good. Obviously, the payment to soldiers of the Home Guard should have constituted a just charge upon the United States treasury; but that was not the opinion of Cooley and his associates. A sum of one hundred thousand dollars was by them set aside to be apportioned among "soldiers[609] that enlisted in

[609] In the matter of the claims of Creek Indians who served in the Federal army, *Senate Document*, no. 67, 55th congress, 1st session is important. The claim of the Home Guards to the bounties and pensions granted to white soldiers, under the various acts of congress (Glasson, *History of Military Pension Legislation*, pp. 70-87), was for long a matter of dispute between the War Department, arguing in the negative, and the Department of Justice, in the affirmative. When finally allowed, it gave the usual occasion for fraud. Scarcely had the first regiment been mustered out, when a pension agent, John W. Wright, appeared at Fort Gibson and opened an office. For details of his activities, see *Report of J. G. Blunt*, who acted as attorney for the Creek soldiers (A.G.O., Old Files Section, B 1013, V.S., 1863, Jacket 15 of 15); *House*

the Federal Army and the loyal refugee Indians and freed-[fol. 223] men[610] who were driven from their homes by the rebel forces." The disbursement of the remainder of the nine hundred and seventy-five thousand one hundred and sixty-eight dollars, which was to come to the Creeks for their cession, is for the present purpose immaterial. A claims commission was to be appointed. The treaty now made was to be understood as a full settlement of all Creek[611] claims against the United States. The old treaties, in so far as they were not incompatible with the new document, were to be restored and renewed payment of the old annuities was to begin from the opening of the next fiscal year. The special measures of a general council, premature endorsement of congressional legislation, a grant of right of way to railroads were presented in the Creek treaty as in the Seminole.

[fol. 224]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 16

[Handwritten notation—Pickett's History of Alabama—Vol. II (1851 Ed.).]

Did the proud, the powerful, the shrewd Alexander McGillivray surrender these valuable lands for the pitiful

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Report, no. 96, 42nd congress, 2nd session; *Interior Department Files*, 1852-1868. Wright's "Argument to the Secretary of War," E. M. Stanton, is most instructive as also, in repudiation of the charges against himself, his "To the Public," which was published in May of 1869. Wright contended that those opposed to him were "the regular Indian Ring, who, finding their power obtained under the late Administration quite gone, seek to put on an honest face and gain favor with the powers that be."

[610] In Indian Office *Special Files*, no. 284 are several documents, bearing upon the Creek claim for reimbursement because of money paid out of Creek funds to negroes who were not Creek, but wholly or in part, Cherokee freedmen.

[611] The loyal Creek claims are the subject matter of innumerable documents filed among the *Special Cases* in the Indian Office. Special Case, no. 52706 of 1906 is the general file number for many of them. In General Files, *Creek*, 1860-1869, are papers dealing with the Creek Orphan Fund, which, subsequent to the negotiation of the treaty of 1866, became the occasion of a more or less acrimonious correspondence.

amount already mentioned? Ah!—but the reader must not be too fast. There was a *secret* treaty between him and Washington, which now, for the first time, comes to light, in history. It provided that, after two years from date, the commerce of the Creek nation should be carried on through the ports of the United States, and, in the meantime, through the present channels; that the Chiefs of the Ocfuskees, Tookabatchas, Tallases, Cowetas, Cussetas, and the Seminole nation, should be paid annually, by the United States, one hundred dollars each, and be furnished with handsome medals; that Alexander McGillivray should be constituted agent of the United States, WITH THE RANK OF BRIGADIER GENERAL, AND THE PAY OF TWELVE HUNDRED DOLLARS PER ANNUM! that the United States should feed, clothe and educate Creek youth at the North, not exceeding four at one time.

Thus Colonel McGillivray secured to himself new honors, and a good salary, by a secret treaty, which left him in a position to return home and to intrigue with Spain. Even [fol. 225] in the presence of Washington and his able cabinet, the Chieftain pushed hard for favorable terms, and received them.*

Receiving half of his salary in advance, McGillivray left New-York, with the Chiefs, for the bright waters of the Alabama. A veil of silence covers the acts of the august Chieftain, for several months, and we hear nothing more of him, until he was visited, in the nation, by Lieutenant Heth, who bore with him two thousand nine hundred dollars, in gold, the balance due to the Chiefs, agreeably to the treaty. He brought this money, on pack-horses, from

* I am indebted to Colonel John A. Campbell, an eminent lawyer of Mobile, and to Mr. Alfred Hennen, a distinguished member of the New-Orleans bar, for placing in my hands papers filed in the District Court of Louisiana, containing the letters of Alex. McGillivray to Panton, dated at Little Tallase, September 20th, 1788, and August 10th, 1789, which have been copied, in this History, at length. I also found, among this file, the "secret treaty," written upon sheep-skin, and signed by Washington, Knox, McGillivray and the Chiefs. A celebrated law-suit, brought in this court, by Johnson and other claimants, under the heirs of McGillivray *vs.* the heirs of Panton, was the means of the preservation of these important historical papers.

New-York, around by Virginia and East Tennessee. Heth was instructed to remain with McGillivray a long time, and endeavor to get him to carry out the provisions of the treaty, in regard to the restoration of prisoners and negroes, and the running of the line between the Creeks and Georgians.

[fol. 226]

EXCERPTS FROM CLAIMANT'S EXHIBIT No. 17

1st CONGRESS.] [2d SESSION.

No. 10.

THE CREEKS.

COMMUNICATED TO THE SENATE, AUGUST 4, 1790.

Gentlemen of the Senate:

In consequence of the general principles agreed to by the Senate in August, 1789, the adjustment of the terms of a treaty is far advanced, between the United States and the chiefs of the Creek Indians, now in this city, in behalf of themselves and the whole Creek nation.

In preparing the articles of this treaty, the present arrangements of the trade with the Creeks have caused much embarrassment. It seems to be well ascertained, that the said trade is almost exclusively in the hands of a company of British merchants, who, by agreement, make their importations of goods from England, into the Spanish ports.

As the trade of the Indians is a main mean of their political management, it is therefore obvious, that the United States cannot possess any security for the performance of treaties with the Creeks, while their trade is liable to be interrupted or withheld, at the caprice of two foreign Powers.

Hence it becomes an object of real importance, to form new channels for the commerce of the Creeks through the United States. But this operation will require time, as the present arrangements cannot be suddenly broken, without the greatest violation of faith and morals.

It therefore appears to be important, to form a secret article of a treaty, similar to the one which accompanies this message.

If the Senate should require any further explanation, the Secretary of War will attend them for that purpose.

GEO. WASHINGTON.

UNITED STATES, *August* 4, 1790.

The President of the United States submitted the following question, for the consideration and advice of the Senate:

If it should be found essential to a treaty, for the firm establishment of peace with the Creek nation of Indians, that an article to the following effect should be inserted therein, will such an article be proper? viz.

SECRET ARTICLE.

The commerce necessary for the Creek nation shall be carried on through the ports, and by the citizens of the United States, if substantial and effectual arrangements shall be made for that purpose, by the United States, on or before the first day of August, one thousand seven hundred and ninety-two. In the mean time, the said commerce may be carried on through its present channels, and according to its present regulations.

And whereas the trade of the said Creek nation is now carried on wholly, or principally, through the territories of Spain, and obstructions thereto may happen by war, or prohibitions of the Spanish government,

It is therefore agreed between the said parties, that in the event of any such obstructions happening, it shall be lawful for such persons as the President of the United States shall designate, to introduce into, and transport through, the territories of the United States, to the country of the said Creek nation, any quantity of goods, wares, and merchandise, not exceeding in value in any one year, sixty thousand dollars, and that free from any duties or impositions whatsoever; but subject to such regulations, for guarding against abuse, as the United States shall judge necessary; which privilege shall continue as long as such obstruction shall continue.

* * * * * * *

[fol. 227]

The United States of America in account current with Alexander McGillivray, and the Creek nation, from the 7th of August, 1790, to the 7th of August, 1791.

Dr.		Cr.	
1791,		1790,	
Aug. 7th.		Aug. 18th.	
To an annuity to the Creek nation, agreeably to the fourth article of the treaty of peace, dated the 7th Aug. 1790, and ratified by the President of the United States of America, the 13th day of August, 1790, - - - - - - - -	1,500	By so much paid A. McGillivray, agreeably to his receipt, - - - - - - - -	600
To an annual allowance, at 100 dollars, to each of the following chiefs:		By so much to Joseph Connell, interpreter, agreeably to his receipt, - - - -	200
The chief of Oakfuskees,	100	1791,	
The chief of the Tuckabatches, - - - - -	100	May 31st.	
The present Tallasse King of the Halfway-house, - - - - - -	100	By balance due on the 7th of August, 1791, transmitted this day by Ensign John Heth, - - - - -	2,900
The chief of the Cussetahs, - - - - - -	100		
The chief of the Cowetas, - - - - - -	100		
The chief of the Micasukee, - - - - - -	100		
To Brigadier General A. McGillivray, his salary as agent of the United States, at the rate of $1,200 per annum, - - - - - - -	1,200		
To salary of two Interpreters, at the rate of $200 per annum, - - - - -	400		
	$3,700		$3,700

Received from the United States of America, by the hands of John Heth, the sum of two thousand nine hundred dollars, being the balance of the above account, for which I have signed triplicate receipts of one tenor.

* * * * * * *

[fol. 228]

CREEK AGENCY, *24th April*, 1813.

Estimate of the stipend to the Creeks, for the year 1813, *to be furnished in money.*

Treaty of New York,		$ 1,500
Treaty of fort Wilkinson,		3,000
Convention of the City of Washington, eighth instalment,		12,000
		16,500
Secret treaty with Alexander McGillivray, at New York, Great Medal chief, and associates,		
Hoboheilthle Micco, of Tallassee,	100	
Cussetah Micco, of Cussetah,	100	
	—	200
		$16,700

Efau Haujo, of Tuckaubatchee, died last year: these two are all remaining of those provided for by that treaty.

Under the Road convention, the Creeks are to receive 500 spinning wheels, and 500 pair cotton cards, for the present year: the contracts for the whole are made to be delivered at the end of the year, at three dollars per wheel, 1,500 dollars.

There are three bridges and one flat to be finished this year, and some iron and steel to be wagoned to the agency and to Tuckaubatchee. This, with the bridges and flats made last year, cards sent on, 500 spinning wheels delivered that year, closes the contracts under that convention.

Cotton cards should be No. 10, or upwards: some numbered 4, 5, 6, sent on last year, are of no account.

BENJAMIN HAWKINS, *Agent for I. A.*

The chiefs are much in want of their annuity for the last year. As I know of no cause why it is suspended, I have none to assign them. They have, as usual, made due bills for the part assigned themselves, which they have negotiated with the U. States' factory. But the remainder is wanted to pay their warriors, and other contingencies of the nation, and to assist their old people in distress.

• • • • • • •

[fol. 229]

EXCERPTS FROM CLAIMANT'S EXHIBIT NO. 18

Extract from the book "The Road to Disappearance" by Angie Debo, published by University of Oklahoma Press, 1941:

"Many years after the treaty [of August 7, 1790] was signed, the indefatigable Alabama historian, Albert James Pickett, uncovered a significant document among some dusty court records in Louisiana. It Was a secret treaty engrossed on parchment and signed by Washington and Know and McGillivray and the other chiefs; and it provided that McGillivray should be recognized as the agent of the United States with the rank of brigadier general and a salary of $1,200 a year, and that six other chiefs—Opothle Micco, of Tallasi; Efa Harjo (Mad Dog), of Tuckabatchee; and the chiefs of Okfuskee, Coweta, Cusseta, and the Seminoles—should each receive a handsome medal and an annual stipend of one hundred dollars. The treaty also provided that after two years the commerce of the Creek Nation should be diverted from its existing channels and carried through United States ports."[11]

"McGillivray received one half of his 'salary' in advance before he left New York, and subsequent payments to him and the other chiefs were carefully kept up. When Efa Harjo died in 1812, at least two of his colleagues—Opothle Micco and a chief of the Cussetas whose identity is difficult to discover—were still living and receiving their stipends. Obviously Washington and Knox had carried out their intention to bribe the chiefs, but subsequent events were to show that the money did not purchase their subservience, and it is impossible to determine to what extent it induced them to sign the treaty. * * *

* * * * * * *

"Matters were in this unsettled state when death ended the troubled career of Alexander McGillivray. He died February 17, 1793, at the home of his wife, the daughter of a French Huguenot named Joseph Cornell. * * *"

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[11] Ibid., I, [I.A., A.S.P.] 80-82, 127, 255, 315f., 840; Pickett, History of Alabama, 399-407; Charles J. Kappler, Indian Affairs, Laws and Treaties, II, 25-28."

[fol. 230]

EXCERPTS FROM CLAIMANT'S EXHIBIT No. 19

EXTRACTS FROM 1 I. A., AMERICAN STATE PAPERS.

"Creek Agency, 21st June, 1814

* * * * * * *

"The Government are certainly risking much, if the British contemplate hostility in this quarter, by their neglect of the friendly Indians, who have received no part of their annuity for 1812 and 1813, except what the chiefs received the first year. I have an express from General Graham, requesting my attendance at Tuckaubatchee, to consult with him, on the present situation of our affairs. I go immediately. The third regiment would be at fort Jackson the 20th instant.

BENJAMIN HAWKINS

General Armstrong, Secretary of War.

"Creek Agency, October 5, 1814.

"I send the enclosed, on the probability that you will receive it by our mail sooner than the direct conveyance through Tennessee. Major McIntosh marched on the 23d ult., with one hundred and ninety-six warriors, twenty rounds ammunition, twenty days' provisions. Some reinforcements have followed, and some were to join from below, expecting in all from three to four hundred—enough for his object. Our chief complain much against us. They say 'Government has not been just to them, in withholding their annuity for 1812, '13, and '14, without assigning any reason for it. They have been faithful to their treaty stipulations with us, yielding whatever was demanded of them. General Jackson is in hopes justice will be done them; but it is still delayed. They are called on for warriors, for runners, and other purposes, without receiving any pay for the services they have often willingly per-

formed. They are now in a manner naked, their hunting done, their resources destroyed by their civil war, and they are without the means of clothing their helpless people and themselves, and winter is approaching.'

"I am respectfully, and with great personal regard, dear sir, your obedient servant,

BENJAMIN HAWKINS.

Mr. Monroe, Acting Secretary of War."

[fol. 231] DEFENDANT'S EXHIBIT No. 72

Creek agency 24th March 1803

I have sent George Cornells down with a packet for government and one pack horse for some coffee. The Majr. is requested to give an order for some provisions for the path home. Your request about cattle I have communicated to such chiefs as I have seen, but they are very generally in the woods. Youholo Micco of Eufaulau has a paper to you and will bring you some with his skins and furs.

We have had a combined effort of the Seminoles with the chiefs in opposition in this agency to disturb our place but hitherto without effect. In the spring it will be renewed as the meeting of the nation is fixed for the 20th of May.

I send you a bottle of oil with assurance of sending you more next month when I shall send for the balance of the stipend goods for the expences of the National council.— I have this day drawn on you at the request of the speaker for the Nation for forty dollars to be paid out of the stipend for this year, he did not like to do it by anticipation nor did I think he should but the men who have the orders have them for public service, and I or the nation must pay and I think they should and I know you will have both money and goods of there's during the summer. I am in want of coffee, 3 gross of binding yellow, light blue or green and 6 bunches of white tape, 6 needles. If I have any coffee with you send it, if not, send from your own stock.

Remember me to you Lady and family and Lt. Pyatt and believe me with must esteem and regard

Yr. Obedient Servt.

Mr. Halsted BENJAMIN HAWKINS

[fol. 232]

DEFENDANT'S EXHIBIT No. 73

Creek Agency 2 July 1803

James Forrester is to receive thirty five dollrs. of the stipend due the Cussetah this year, to be paid on its arrival and on the order of his Chiefs for a horse of his drowned crossing Challohochee going to Ocheubasace on public acct. by order of the Cussetah Miccio and five chalks for a beef.

BENJAMIN HAWKINS
Agt. for I. A.

[fol. 233] Creek agency 27 Augst 1803

Mr. Halsted U. S. factr.

Pay James Forrester thirty six dollars and 25 cents out of the stipend allowed by the U. S. to the Creeks for 1802 if so much remains in his hands and otherwise out of the stipend of this quarter for the purposes expressed in this order by order of the Chiefs.

BENJAMIN HAWKINS
Agt. for I.A.

26.25 dollrs.

36 dlrs.
4 –

144 – 25 cts.

Pd. by Mr. Smith while I was sick and charged 26 Septr. 1803

[fol. 234] DEFENDANT'S EXHIBIT No. 74

Oasoochee 9th August 1803

Sir

We arrived here on the 7th and Colo. Hawkins on the 8th. General Wilkinson is yet arrived but has informed Col. Hawkins that he has been apprised of the treaty by a letter dated Fort Adams 15th May but no certain account since been heard of him.

A full representation of the Indians is present, but I still have my doubts of the lands being obtained and to add to the difficulty a report is in circulation that an Indian of this town has been killed a few days past over acone it is reported by his companion that he saw a white man shoot him and afterwards stab him with his knife.

I have sent the bearor down for the list of the stipend goods and send you some letters that I forgot to put in the post office you will please to dispatch him as quick as possible and furnish him with provisions for him self and horse.

My respects to Mrs. Halsted and family and believe me to be with respect

Sir

your obt. servt.

WILLIAM HILL

Mr. Jonathan Halsted

P.S. Forward what letters and papers you may have come on hand.

[fol. 235] DEFENDANT'S EXHIBIT No. 75

War Department June 13th 1803

Sir

The Treasurer will be directed to transmit you 6,000 Dollars. You will pay the Bills drawn by Lieut. Wilkinson, excepting the one which has been heretofore rejected. The accounts for transportation of Indian factory goods and annuities should be forwarded to this office for settlement.

I am &c

[fol. 236] DEFENDANT'S EXHIBIT No. 76

Fort Wilkinson 4th June 1803

Since writing you, yesterday I have recd. from the Treasurer of the U. States, (by direction of the Secy of War) a Check on the Cashier of the Office of Discount of deposit at Savannah for two thousand Dollars to be pd. to the Order of yourself, Gen. Wilkinson & Genl. Robert Anderson for the purpose of defraying the Expences of holding a Treaty with the Creek Indians—And have also recd. instructions from the Secy of War to furnish you with 3000 Dollars worth of goods if Called for, which instructions were accompanied by a packet from the Secy to you, which it is presumed contains instructions relative to the Aprl. Treaty. It has therefore been thought advisable to forward it immediately under an Expectation that it might possibly reach you before the adjournment of your annual Meeting by which means you would have an opportunity of making any communications to the Chiefs that might be necessary, without the Trouble of calling them together for the purpose.

The packet above alluded to, with nine newspapers for your self & one letter for Mr. Hill will be handed to you by Mr. Piatt, who has been so good as to offer to take them to you—Please to present my respects to Mr. Cotton and Mr. Hill—

am with Esteem

Yours respectfully

JONA HALL U.S.F. Col. Benjm. Hawkins

[fol. 237]
[fol. 237]

DEFENDANT'S EXHIBIT No. 77

Col. Benjm. Hawkins Fort Wilkinson 31st April 1803

In obedience to the request contained in your favor of the 13th inst. I have furnished Ecunchat Emauhlaw the best of the stipen goods on hand amountg. to $112.4½ & to complete the order got Mr. Hill to select out of the goods belonging to the factory such as he supposed would be most suitable for the purpose for which they were intended & for your government enclose a schedule thereof exhibiting the articles taken out of the stipend from those taken out of the factory.

3 pr. blankets
3½ Gro bindg.
4 yd Scarlet
½ p. green
6 yd. blue cloth
1 p. calico
3 pr. Gunahs
500 needles

Annexed you have a list of all the goods remaining on hand belonging to the stipend, in addition to which there is due to that acct. from the factory $108.50.

As the due bill which I gave Monack has not been presented for payment, it is presumable that it will never be found as so considerable a time has elapsed since it was lost.—I have therefore sent him per the bearer 9⅓ yds. furniture calico @ 75 cts. p. yd. amotg. to 7 Drs. which is the sum the singer states to be due Monack in his note to you & which amot. corresponds with the entry made on the factory books at the time I first learned that the due bill was lost.

I would thank you to mention to the singer that if it should hereafter appear that Monack should have transferred the due bill to some other person & I should be obliged to pay it again that I shall expect that he (the singer) will see that the Monack refunds the amot &c. &c. &c. &c.

[fol. 238]

DEFENDANT'S EXHIBIT No. 78

Fort Wilkinson 16th. Agt. 1804

Sir.

Herewith you will receive duplicate receipts for all goods that have been forwarded by you to me. Addressed to Col. Benjn. Hawkins, Creek Chiefs & for the Creek Annuity for the present year—from the receipts granted you will find a considerable deficiency in the Iron——

Hbe. D. Abraham, Esq.
Agt. for the factory

I am respectfully
Sir
Your Obt. Servt.
J. HALSTED

[fol. 239]

DEFENDANT'S EXHIBIT No. 79

When Received	*From whom*	*Date & Substance*
1805		
March 19	Jesse F. Heald	Washington, Ga. Feby 25, 1805 Acceptance of the appointment of Cadet
23	Porter Hanks	Baltimore March 21, 1805 Requesting an advance of three months pay
26	Jos. R. Henderson	Knoxville March 4, 1805—Acknowledging the ret. of the letter of appointments—will accept as soon as his appointment is forwarded
29	John A. Hanna	Harrisburgh March 26, 1805—Relative to the discharge of Jno. Drally—enclosing documents in support thereof
30	Moses Hooke	Pittsburgh March 26, 1805—Relative to the stores &c forwarded to St. Louis. Vincennes &c
30	Seth Hunt	Vincennes Feby 28, 1805—Explaining his attention on the way to Louisiana—Relative to Rations
April 2	Geo. W. Hakes	Granby Mar. 7, 1805—To Thos. Jefferson—Piteous story
	G. W. Humphrys	Jany 22, 1803. Wishes to be employed in the Superintendance of Keptrystee furnace
	Gov. Harrison	Vincennes Jany 10, 1803. Enclosing a plan of lands lying on the Wabash
	Benj. Hawkins	Ft. Wilkinson—Jany 12, 1803—Relative to issuing rations to Indians
		Ft. Wilkinson—Jany 12, 1803—Accompanying sundry vouchers for payments of annuities to Indians, and for the contingent expenses of his Agency

[fol. 240]

When Received		*From whom*	*Date & Substance*
April	6	Moses Hooke	Pittsburgh Mch 27, 1805—Relative to orders sent from Gen. Wilkinson to contract for Boats &c to descend the Ohio
	9	Benj. Hawkins	Creek Agency Mch 5, 1805—Relative to the movements of Capt. Swains Detachment & enclosing a report of the speaker to him & a letter from Swaine.
	10	B. Hawkins	Relative to the burning of Mordecai's house &c Enclosing an Indian talk & his answer
	16	Jesse F. Heard	Washington Ga. March 26, 1805—Resignation of his appointment as Cadet.
	16	Benj. Hawkins	Creek Agency Mch 20, 1805—Acknowledging the rect. of a letter of Feby 1805—Relative to a visit of the Chiefs to the seat of Govmt.
	20	Jas. House	Ft. McHenry Apr 18, 1805—Has recd. the Sectys. Letter of the 16th inst. with the note enclosed & will attend to it
	20	Jona. Halstead	Ft. Wilkinson Mch 23, 1805—Enclosing a letter to the Acting Agent of Ind. factories & an inventory of the public property on hand at that Factory &c to Dec. 31, 1804
	20	Thos. & Chloe Hill	Norway Ap. 11, 1805—Wish their son discharged
	29	J. May & J. Weston	Erie, Pa. Ap. 10, 1805—Relative to the U. S. property in that County

[fol. 241]

DEFENDANT'S EXHIBIT No. 81

War Department
May 9th 1806

Sir

I have directed the Treasurer of the United States to remit $5501.30 to the cashier of the Office of Discount and Deposit at Savannah, Ga. to be place to your credit, being the amt. of Col. Hawkins estimate of expenditures in the Creek agency for the 1st quarter of 1806 and of the cash part of the annuities to be paid the Creek nation and Creek Chiefs for the present year, for which sum you are holdin accountable to produce Col. Hawkins receipt, I will thank you therefore to pay his orders upon you to that amount.

I am very respectfully, Sir

Your obt. Servt.

N. DEARBORN

Jonathan Halsted, Esq.

[fol. 242]

DEFENDANT'S EXHIBIT No. 82

Creek agency 19th June 1806

I intended to pay you another visit ere this but the pressure of business and my infirmities have prevented. I have recently returned from the Highshoals of apalatche and should have come by the Fort but I was unable to mount my horse without aid, and I did not wish to give Mrs. H. the trouble of nursing me one of my legs and feet have been much swelled and very painful, and yet I am compelled to this for fear of geting worse.—

I have letters from the Secy at War informing that you have a credit with the branch bank at Savannah for 5501.30 dolrs. to be paid on my orders 1776-30/100, we shall soon be drawing for and the remainder being a part of the stipend to the Creeks, we shall not soon want—

I wish you to inform me, when you will receive the order I gave you, for some oil for leather, millsaws are to be sent for to Savannah. I shall begin the ride early in July your mare I will send as soon as she is done with the horse.

I am very sincerely

Yr. obdt. Serv.

BENJAMIN HAWKINS

I want 1 lb. of pepper
if you have none Mr. Spence
will go to Millidgeville for some

Mr. Halsted

[fol. 243]

DEFENDANT'S EXHIBIT No. 83

Creek agency 28th Feby. 1806

I yesterday gave a draft on you N. 1. for 300 dollrs. in favor of John Rhords to be paid for by a bill on the Secy. of War out of the stipend of 5,000 set apart by the Treaty at Fort Wilkinson, you will take his ret. of in Triplicate, one on the voucher which he will give you and you will retain until the whole amts. are deposited with you.

I will be down with you in eight or ten days at most and take a day with you to strike the ballance from the books of Mr. Price late U. S. factr.

I am with much esteem Sir

Yr. Obt. Ser.

BENJAMIN HAWKINS

Mr. Jonathan Halsted U. S. Factor

[fol. 244]

DEFENDANT'S EXHIBIT No. 84

Ocmulgee Oldfield Sept.

I returned from F Wilkinson this eveng where I went for money to pay your draft infavor of Capt. Saml. Gordon, but on examination find that claims of a similar nature were pd to him by a draft on the secy of War from which circumstance & from your having mentioned that the "vouchers were in yr hands to be delivered to me" & no instance having occurred before wherein yr order on the stipend was accompanied by any other voucher: I have suppposed that it was yr intention that it should be pd in the usual way & have therefore given him a draft on the secy to be pd out of the 5000 D. fund set apart by the treaty of 1802—

Being fearful that I might have misconstrued yr meaning I have requested Martin to accompany the Capt. as far as your residence with the money & if it should have been yr intention that he should have the money you will please to direct Martin to pay it to him & take the bills which I have given the Cap.— As I was about to start yesterday morng from this to the old Garrison I met with a Mr. Johnson by whom I sent you a packet containing 1 letter & 7 papers which I trust you have recd.— The Asst. military agent has neither saddles nor pillions nor are there any in the factory— I will as soon as I return to Milledgeville endeavor to procure the number you want— Your homespun has been here several days & shall be forwarded if an opportunity should present previous to my leaving this—

I am very respectfully

J. H.

Col. Benjn Hawkins

DEFENDANT'S EXHIBIT No. 85

When Received		*From whom*	*Date & Substance*
1806			
Nov.	24	Eben Huntingdon	Norwich Nov. 18, 1806. Enclosing returns of the Militia of the State of Connecticut.
	25	Moses Hooke	Natchitoches Oct. 16, 1806. Advising a draft of $800.
	28	Ditto	Natchitoches Oct. 14, 1806. Enclosing a copy of an extract of a Genrl. Order appointing him Qr. Master and shall draw for such sums as may be required.
Dec.	4	Wm. Hull	Detroit Oct. 6, 1806. Enclosing a memorandum of Articles of the annuities for the Wyandots for the year 1807.
		Hoetzdon J. Harris	Phila. Dec. 1, 1806. Soliciting a further advance on account of Mr. John Smith's contract.
	6	Thos. Hunt	Bell Fontaine Oct. 1, 1806. Has recd. a letter of enclosing Mr. Morrisons Contract—Transmitting a return of the Garrison.
	6	Wm. Hull	Detroit Nov. 13, 1806. Relative to the Checks sent to pay the annuities &c. The murder of an Indian by the little Bear a Chippeway Chief.
	6	John Hubbard	Dartmouth College Oct. 4, 1806. recommending Stephen Roberts & Sylvanus Thager for Cadets.
	8	Thos. Harris	Louisa Cohensa Nov. 10, 1806. Relative to Certificates of services rendered and disability left in the War Office by H. Dawson

When Received	*From whom*	*Date & Substance*
9	Benj. Hawkins	Creek Agency Nov. 12, 1806. Has received letters of the 1st Ult. The arrival of the Stipends for the Creeks and Cherokees. Enclosing an estimate for the 3rd Qr. of 1806.
[fol. 246]		
Dec. 10	Thos. Hunt	Bell Fontaine Nov. 10, 1806. Transmitting a monthly and Inspection Return.
11	Jas. Hanham	Fort Independence Dev. 1, 1806. Has received his letter of promotion.
15	David Hawley	Stratford Dec. 8, 1806. Documents in support of his claim to an increase of pension.
20	Wm. Hull	Detroit Nov. 20, 1806. Enclosing a Copy of his proclamation for the Government of Indn. Traders relative to the payment of annuities.
23	Jas. A. Hemphill	Chester Dist. So. Ca. Nov. 15, 1806. Soliciting a appointment as Surgeons Mate at Rocky Mount.
24	William Hall	Norfolk Dec. 10, 1806. Relative to the Constructing of Gun Carriages at that place.
24	Peter Hunt	Trenton Dec. 20, 1806. Enclosing a Return of the Militia of the State of New Jersey a copy of the Militia Law.

[fol. 247]

DEFENDANT'S EXHIBIT No. 88

Ocmulgee Oldfields 18 June 1807

Sir

In obedience to the directions contained in your favor of 14 Apr. last I shall send to the office of Discount & Deposit at Savannah for the sum placed to my credit by the Treasurer of the U.S. for the payment of the cash part of the stipend due the Creek Nation for the current year and as soon as the money is paid over to the persons authorized to receive it I shall forwd. Col. Hawkins receipt for it—

Herewith inclosed you will receive for Genl. John Shee Sup. of Indian Trade sundry papers appertaing to the Accts. of E Price former & E Wright late factors, which you will be pleased to have forwarded as addressed—

I have &c.

J. H.

The Secy of War

[fol. 248]

DEFENDANT'S EXHIBIT No. 89

Creek Agency July 9th 1807

Benjn. Hawkins—relative to the
murder of a White man by a Creek—
Cash part of the annuities arrived—
Scarcity of Corn in the Agency

R.

free

The Honble

Henry Dearborn
Secy at War
City of Washington

Recd. Augt. 17, 1807

[fol. 249] Creek Agency 9th July 1807

Your favour of the 14th April and 16 June I had the pleasure to receive yesterday, the first came by the way of Nashville and Athens in Georgia and A. Lewis the P. M. there certifies it came with the seal broken.—the most economical rout for letters to reach me is by Milledgeville from whence a military runner carries them to Ocmulgee within thirty miles of the agency from whence they are conveyed to me by the factor for the United States in care of some of the traders or Indians who are generally passing almost daily between the factory and agency. But the most expeditious is the Orleans mail to Cowetah in sixty miles of me. From whence letters are now conveyed to me for three dollars. I have directed the agent for the post office there to send all public letters to me from thence by a runner, and to let other letters find their way to me as opportunity may offer.

I received sometime past from the Indians an account of a murder commited by one of their people on a citizen of Georgia and directed an inquiry into the truth of the report. On the 2nd instant I recd. a letter from the Governor of Georgia with the particulars. It appears to be a very deliberate murder without provocation as is aledged and admitted by some of the Chiefs. I have issued orders to apprehend or punish the offender and measures are in train for carrying the order into effect.

Wm. Halstead the U. S. factor has informed me that money for the cash part of the stipend due the Creek nation and Creek Chiefs for this year is deposited in [fol. 250] Savannah to his credit But I have heard nothing of the goods or articles deemed necessary for the plan of civilization for the present year. The agricultural part is retarded for want of the hoes, however the supply will be equally useful the ensuing year.

We have had a greater scarcity of corn than was ever known in this country two thirds of the Indians. We have had a greater scarcity of corn than was known in this country, two thirds of the Indians have not had any since April and have lived on their beef and milk, those who have stocks and those who have not, by theft or on China

briar root by Potatoe, Blackberries and wortleberrys some have actually starved. It is emphatically named the hungry year. It has been the most expensive season I have ever experienced from March to the present time the hungry visitors alone consume two beeves per week and apropor-tion of bread, corn for the latter is worth three dollars pr bushel. Our water melons pumpkins, squashes, young corn, and beans are eatable and we have fine moist weather.

I have the honour to be very respectfully

Sir,

Your Obedient Servt.

BENJAMIN HAWKINS

The Honble

Henry Dearborn

Secy. at War

[fol. 251]

DEFENDANT'S EXHIBIT No. 90

Colo. Benjn. Hawkins — United States Agents Office

for

Jonthn Halstead, Esqr. — Savannah 3d August 1807

Sir

Enclosed you will receive Joseph Thomas; Receipt for sundry articles of Indian annuities which are sent by his waggons.

I am respectfully Yr. Obt.

THOS. BOURKE

United States Agent

[fol. 252]

DEFENDANT'S EXHIBIT No. 91

To Henry Dearborn, Secretary at War—

Ocmulgee UST House Dec. 8th. 1807

Sir

I do myself the honor of transmitting to you the several following inclosures—viz A Receipt of Mr. Alexander Cornels first Chief in the Creek Nation for five-hundred &thirteen dollars & twenty five cents, conformally to my draft (by the request of Col. Hawkins) of the twenty third of January past.

A duplicate of a draft forwarded you on the 5th. June last (by desire of Col. Hawkins) in favor of Honuble Emautlau Phlueco for one hundred & twenty dollars. The first of the same tenor being unpaid, it has probably miscarried; you will therefore be pleased on the receipt of this to direct the amt. to be payed to my credit at the Office of Discount & Deposit in Savannah; whence it can be received & paid over by me.

Receipts of the Upper & Lower Chiefs of the Creek Nation for their Stipend, are also inclosed. I am not certain whether or not your office be their proper deposit: They are however submitted to your instruction; after which you will have the goodness to dispose of them as may be correct—

I have the honor to be &c.

J. HALSTED USFactor

[fol. 253]

DEFENDANT'S EXHIBIT No. 92

To Levi Shiftall Esq. Mty A.

Ocmulgee—US Trading House
Dec. 8th. 1807

Sir

You will herewith receive Mr. Carters' waggon eight bundles of Deer Skins in the hair, weighing altogether two thousand one hundred&sixty two pounds, as Receipt inclosed: Also Receipts for the Annuity Goods as being all correctly forwarded; the mistake otherwise having arisen from some of the heads of the Casks having been broken & their marks thereby demolished, but by a reexamination of the articles by the Invoices which just then had been received by the Agt. for Ind. Affairs the whole amt. was discovered to have been received— You will also receive herewith a receipt for the Goods of this Trading House as forwarded by James Wicker.

With regard to Frizels' demand for the carriage of Cherokee Goods erroniously delivered here, it is impossible for me to state (as no accounts of the Cherokee = Department are kept in this Factory) what is the amount to which he is entitled. The Goods which he delivered corresponded with the receipt which he bought: on the back of which receipt I gave him a certificate to that amount.

You wish to be advised concerning Deer Skins. It is the intention of Government I believe, (at least such are my instructions,) that they should be forwarded with the Furs to the Superintendent of Ind Trade—

I thank you for your attention in transmitting Hand Bills, & am

Sir—respectfully— J. HALSTED US FACTOR

[fol. 254]

DEFENDANT'S EXHIBIT No. 93

To Levi Shiftall—Esq—Milty Agent—Savannah

Ocmulgee—U States Factory
August 5th. 1807—

Sir

Inclosed is transmitted to you a receipt for Creek Annuity Goods sent by Greenlee's Waggon under date by his receipt therewith attending 14th. July. This waggon as well as the two immediately preceeding—were incorrectly directed by you to Capt. Both, who is in nowise connected with this department. They should have been directed to Jonathan Halsted U States Factor &c.—

By Greenlee as above mentioned was received three boxes included in the body of his receipt but not marked in the margin—viz Nos. 4.7.8.—

I am Sir yr. v. Obt. Svt.

A. P. FORSTER A.U.S.F.

[fol. 255]

DEFENDANT'S EXHIBIT No. 96

Creek agency 20th Decr. 1809

Herewith inclosed we send you the amount of the payment of the cash part of the annuity of 1807. There is now a set of books kept at the Factory for the Indian department distinct from those of the U. States factory. The money and goods does not come to the hand of Col. Hawkins, but is reed at the factory in care of the factor and paid to the order of the chief, the goods are paid in Bales as reed on a day appointed by the chief, and the balance of cash on hand at the time is pd over to them. They sometimes direct a sum to remain for their contingences which is kept for them and paid to their order.

It does not appear the factory reed anymore goods or money for 1807 than was actually due the Creeks for their

stipend of that year, and if there is a mistake it is in the wording of the rect. and not in the payment.—

WILLIAM SIMMONS
Acct. War Department

[fol. 256]

DEFENDANT'S EXHIBIT No. 99

Estimate of the stipend to the
Creeks and Creek Chiefs for 1808

Creek Chiefs	1,000
Medal Chiefs	300
Creek Nation	16,500
	$17,800

[fol. 257]

Stipend to the Creek nation for 1808

Treaty of New York	1,500	Dollars
ditto of Fort Wilkinson	3,000	4,500
Convention of Washington 3rd instalment		12,000
		16,500

Stipend to the Modal and Creek Chiefs for 1808

The Medal Chiefs		
Efan Harjo of Tookaubatche Hopoithle Micco of Talesee Cussetuh Micco of Cussatuh	300	
Treaty of Fort Wilkinson	1,000	
To be paid in the following articles		1,300

For the Lower Creeks

3,000	Dollars	in Blankets assorted
3,000	"	in Strouds
250	"	in Brass kettles from three to two gallons
260	"	in Saddles
25	"	in hand saw files
50	"	In hand saws

50 Dollars in screw augers Inch, Inch and quarter, and Inch and half
50 " in gimblets assorted
100 " in Iron, half axe bar
50 " in steel
500 " in corn hoes 10 inch
200 " in club axes, those marked NL had no steel
357 " in Calico
358 " in Romals

8,250

[fol. 258]

For the Upper Creeks

3,000 Dollars in Blankets assorted
3,000 " in strouds
120 " in iron, half axe bar
60 " in steel
600 " in corn hoes 10 inches wide
600 " in rifle powder
240 " in Led
30 " in flints
600 " in money

8,250

For the Lower Creek Chiefs

200 in course match coats
150 in Blankets, 3 point
150 in Strouds

500 Dollars

For the Upper Creek Chiefs

250 dollars in Blankets 3 point
250 " in Strouds

500

The Modal Chiefs

300 Dollars in money

Creek Agency 24 Dec. 1807
BENJAMIN HAWKINS
Agent for I. A.

[fol. 259]

DEFENDANT'S EXHIBIT No. 102

Ocmulgee U. S. Trading House 4 Augt. 1808

Sir

Inclosed are the receipts signed by David Owens as you desired for the freight of goods from Savannah to this place. In David owens' Receipt of the 24 of June delivered you a load of goods and which you inclosed to me are enumerated the following articles (viz

Upper Creeks Annuity chiefs
5 teirces N 1 3 5 4 2

Lower Creeks Annuity
1 Bale N 31
4 Teirces 24.21.23.20

Hawkins Iron and steal 17 bars. Oof which not one of the numbers corresponded with the load. the same quantity of teirces were however received (without any bale) marked as follows—Upper Creeks—2 teirces N 24.26.—Lower

Creeks—6 teirces N 3.28.36.38.39.40—16 Bars Iron & Steal As there has evidently been some confusion in loading the waggons and as I have not yet received the Invoice. I would be glad you would inform me whether you have sent forward all of the annuity Goods.—The better to avoid further confusion I would recommend instead of sending in each waggon part of the goods of both the Upper & Lower Creeks to begin with one & complete it before the other be commenced.

I am

Sir Yr. Obedt. Sevt. J. H.

Levi Sheftell Esqr.

[fol. 260]

DEFENDANT'S EXHIBIT No. 109

Creek Agency 30 July 1809

I have just received a letter from Thomas Bourke Esq. United States agent at Savannah enclosing the Invoices of the annual stipend to the Creeks for this year and the articles for the plan of civilization which have arrived there and some on the way to the United States factory at Ocmulgee.

I send you enclosed the estimate of expenditure in this department for the second quarter of this year ending with June last and am very respectfully

Sir

Your obedient servant

BENJAMIN HAWKINS

The Honble
William Eustis
Secy at War

[fol. 261] Creek Agency, 30th July 1809

Benjamin Hawkins,—relative to stipend for the Creek Nation of Indians the present year; —enclosing estimate of Expenditures in that Agency up to 30th June ult.

Creek agency 30 July

The Honble
William Eustis
Secretary at War
City of Washington

Recd. Augt. 21st 1809

[fol. 262]

DEFENDANT'S EXHIBIT NO. 112

Colo. B. Hawkins
or
J. Halstead, Esqr.

U. S. Agents' Office
Savannah 16th August 1809

Sir,

Enclosed you will receive Geo. W. Comeny's receipt for Five hogsheads, containing annuities for Lower Creeks, this parcel finished the Indian annuity received by me. You will please to forward me triplicate receipts for the annuity for the year 1809—which Mr. Linnard requests me to forward to him.

You will also receive Mr. G. W. Comeny's receipt for sundries sent by his waggon on account of Messrs. Peterson & Burkard. The freight of which you will discharge as per receipt.

I have the honor to be

Respectfully

Yr. Obt. Svt.

THOS. BOURKE
U. S. Agent

[fol. 263]

DEFENDANT'S EXHIBIT NO. 114

Fort Hawkins 2d Jany 1810

Sir,

Mr. Halsted being indisposed, it becomes my duty to forward you the receipts of the chiefs of the upper and Lower Creeks, for their stipend for the year 1809, which you will find inclosed herewith.—

I am &c

CHARLES MAGNAN
For J. Halsted U.S. Factor

William Simmons Esq.

[fol. 264]

DEFENDANT'S EXHIBIT No. 117

Creek Agency, Feby 14th 1810

Colo. Benj. Hawkins—relative to the deliberations of the Chiefs of the National Council of the Creeks concerning Roads and Bridges within their Territory; and enclosing an Estimate of the Stipend, due them from the U. S. for the year 1810, which they request may be paid in Money amounting to $17,800.

William Eustis, Esqr.

Secty at War

Recd. March 17th 1810.

[fol. 265] Creek Agency 14th Feby. 1810

In the meetings of the National Council we had a long and interesting discussion relative to the post path thro the agency. The Chiefs after several days deliberation told me, "they objected to Mr. Bloomfield having anything to do to it, because he knowing their treaty stipulations had entered their country in violation of them. He had entered with his waggon and team and commenced and built bridges, whereas the only promise to the President was that he should have a path through their land rendered convenient by boat, over the rivers and logs over the Creeks, this conduct by a man who had resided among them and knew their ways and coming from the Seat of Government had alarmed them being apprehensive he was acting with the knowledge of and approbation of the Government. But the repeated and continued good offices of the government towards them and the assurance of the agent that a president of the United States would not break a treaty, nor alter it without the consent of both parties, had determined them to do all they could on the subject. If the president would appoint a good man and report him to the speaker of the National Council, he would convince the old Chiefs this Spring and let them know he had given such a man

permission to build bridges and he might go on and build them."

Mr. Bloomfield has some how given offense to the Chiefs or some of them, which is not explained in their talk and it is probable the offence has arisen from is removed by the proclamation of the President for taking possession of our West Florida, which has been welltimed, there will now be but little difficulty in managing our Indian Affairs [fol. 266] and none if you can but get the remains of the Spanish claims on our borders particularly Pensacola.

I am with sincere regard and esteem

Sir,

Your obedient servant

BENJAMIN HAWKINS

The Honble
W. Eustis
Secretary at War

[fol. 267] Estimate of the Stipend to the Creeks and Creek Chiefs for the year 1810

Treaty of New York	1500	
of Fort Wilkinson	3000	
Convention of Washington the 5th instalment	12000	
		16,500
Treaty with Alex McGillioray		
Stipend to the Medal Chiefs		
Efau Harjo of Tookeaubatche		
Hoboheilthle Micko of Talesee		300
Cussatuh Micko of Cussetuh		
the warriors of the six Great Medal Chiefs		
Creek Chiefs by the treaty of Fort Wilkinson		1,000
		17,800

To be paid in money agreeable to the request of the Chiefs of the National Council at Chatticekchufaulee the 8th July 1810

BENJAMIN HAWKINS
Agent for I. A.

[fol. 268]

DEFENDANT'S EXHIBIT No. 122

Fort Hawkins 31st July 1810

Sir

Herewith I transmit my report of this Trading House for the quarter ending 30th ulti. consisting of an Inventory of the public property with a transcript of the day book, Journal & Ledger, & also the accounts of the agent of Indian affairs and Creek annuity

If the goods enumerated in the annexed list (the most of which we are much in want of) could be received here by the 20th November the whole of them could be in all probability sold for cash, at a profit of 50 pct to the Indians as their stipend for the present year will be paid altogether in money at this Trading House and the Indians have requested me to provide such articles for them

The enclosed memorandum for 22 rifles is from a respectable merchant of Milledgeville who has no correspondent in the neighborhood where the rifles are made, he will pay for them and every expense attending the delivery of them immediately on the receipt of the bill—if there should be any impropriety in my forwarding this order you will be pleased to destroy it.

I am Ser.

J. HALSTED

Genl. John Mason
Superintendent of Indn. Trade

[fol. 269]

1 Bale best London duffel Blankets
25 Ps. blue strouds
2 ps. Scarlet cloth to cost from 250 to 300 cts. p yd.
40 Groce Saxon blue binding
10 " Yellow ")
) No other colors
10 " Green ")
) will answer
10 " Red ")
50 ps. calico assorted of a good quality & fashionable, Baltimore prints does not answer well
30 ps. calico India wide
10 ps. linen to cost from 40 to 87½ cts. p yd.
4 " Bandano Handkerchiefs
6 doz. Black Silk "
20 " white thread from No. 8 to 20
10 " Cold. " assorted
6 doz. shawls good colors assorted
6 " Broad & narrow tape
4 " Small bass bells suitable for horse bells
3 " large scissars
3 " Pocket Knives
3 " Small "
10 " looking glasses to cost from 100 cts. to 150 cts. p doz.
3 " double bolted padlocks
3 " single " "
2 " Rifle locks
6 " Knives & forks assorted

[fol. 270]

2 casks 8 pd. nails wrought
6 " Iron or tin'd table spoons
4000 needles assorted
5000 Rifle flints
300 " powder
4 doz. cotton cards
3 " Stock locks assorted & 1 doz. womans saddles
2 " Rifles silver star & thumb peice to cost about 11 Drs. each

1 Rifle 3 feet 10 Inches in the barrell to carry 80 or 90 balls to the pound Lock of the first quality, gold touchhold, one inch longer in the breach than usual, doublt triggers, mounted with steel sights, fine, the barrell larger near the muzzle & breach pin than in the middle

1 do. of the same length & finished as the above to carry 60 or 70 balls to the pound

1 do. of same length to carry 50 balls to the pound, gold touchhold, water lock of the best quality plain steel mounting the sights to be course to suit an old man, of a moderate weight, double triggers engraved on the barrell F. Carter

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[fol. 271]

DEFENDANT'S EXHIBIT No. 123

Fort Hawkins 14.th Decr. 1810

Sir

Your favors of 20.th July & 31.st Augt. were received subsequent to my having made up the accounts of this Trading House for the quarter endg. 30th Septr. last, and during my absence, on public business, relative to the annuity to creeks for the current year.

The salary accounts for the factor and assest appear to me to have been entered on the books of this Trading House conformably to your instructions that if not forwarded separate account for each with the quarterly statemts. will hereafter be attended to, & which you will receive herewith for the period required; you will perceive that the acct. for the agent is not balanced by a draft on you, as it would be improper to give a credit that did not correspond with the books of which you have a transcript.

From the cash sales made to the red people last month, I shall be enabled to discharge the balance due the agent last quarter & also all the salaries, as well as every other expenditure in the present one.

Your remarks which relates to charges for furniture and Interpreter cannot be applicable to me, as I have had

neither at a public expence, neither can that for salaries paid at your office.

The inventories heretofore forwarded exhibits the cost of every article on hand all of which are worth their origi-[fol. 272] nal cost (tho many of them are very unsalable & will probably remain on hand a long time as I found them here 8 years ago) except the deerskins and it is impossible for me to state their value as they have been generally sold in Phila. or New York. I can only assure you that we have not a damaged one on hand and that I was offered 16 ct & for them but did not feel myself authorised to sell.

I am Sir

Your L Ser.

/s/ I.H

Genl. J hn Mason
Supert. Indian Trade

[fol. 273]

DEFENDANT'S EXHIBIT No. 124

Estimate for the stipend to
Creeks and Creek Chiefs for
the year 1811

17,800 dollars.

1st Jany. 1811

[fol. 274] The Stipend to be paid by the U. S. to the Creeks for 1811

Treaty of New York	1,500	
of F. Wilkinson	3,000	
6th Instalment of Conv. of Washington	12,000	16,500

Treaty with Alex McGillioray Stipend to the Medal Chiefs

Efau Harjo of Tookaubatche	
Hobohoilthle Micco of Talesee	300
Cussetau Micco of Cussatau	

The Survivors of the six Great Medal Chiefs

Creek Chiefs by the Treaty of Fort Wilkinson	1,000	1,300
	Dollars	17,800
Great Medal Chiefs in money	300	
Lower Creek Chiefs in money	500	

The Lower Creeks

One ton of Iron ¼ ton steel ¼ ton sheet Iron for saw gins and bells
200 pair cotton cards N.12, superfine
4,000 dollars in money the remainder in Blankets and Strouds making for them 8,250 dollars

The Upper Creeks

One ton Iron ¼ ton steel ¼ ton sheet Iron for saw gins and bells
200 pair cotton cords N.12 superfine
4,000 dollars in strouds and blankets
The balance in money making for the Upper Creeks 8,250 dollars
For the Upper Creek Chiefs 500 dollars half Blankets, half Strouds

Recapitulation

Upper Creeks	8,250 dollars
Upper Creek Chiefs	500
Lower Creeks	8,250
Lower Creek Chiefs	500
Great Medal Chiefs	300
	17,800 dollars

Benjamin Hawkins, Agent for Indian Affrs.

[fol. 275]

DEFENDANT'S EXHIBIT No. 127

Fort Hawkins 7th August 1811

Sir,

Herewith I transmit my report of this Trading House for the quarter ending 30th June last, consisting of an Inventory of the public property, with a transcript of the day book, Journal and Ledger and also the accounts of the agent of Indian affairs and creek annuity for said period.—

If we could be furnished with the goods enumerated in the annexed memorandum by the 1st of November, about which time the annuity will be paid to the creeks, it is more than probable they could all be sold for cash at a considerable advance and would be an accomodation to the nation as I have reason to believe that the stores on the frontiers will be badly supplied this fall.

I am &c.

J. H.

5 pr. 3 pt. Blankets
5 " 2½ " do.—
10 " strouds

6 doz. shawls assorted
10 pr. Homespun
30 " good romally
4 doz. blk. silk Hdkfs.

10m. white cotton thread from No. 8 to 18
4 doz. Ivory combs
3 reams fools cap paper
1 " letter cap do.
500 quills
day book, Journal & Ledger
200 m. Powder
500 m. lead

[fol. 276]

DEFENDANT'S EXHIBIT No. 128

Jona. Halsted Esq
Fort Hawkins

Sir

Enclosed you will receive Livingstons receipt for twelve bales Indian annuities for 1811, which I safe to Hand. I hope you enjoy with your family a good State of Health

I am Sir

With Great respect

Yr Obt

J. W. BOURKE

U. S. Agt

Savannah Sept 14, 1811

[fol. 277]

DEFENDANT'S EXHIBIT No. 129

Savannah 10th Sept. 1811

Colo. Hawkins

or J. Halsted, Esqr.

Fort Hawkins

Sir

I enclose you the Invoices of Indian Annuities for 1811

I am respectfully

Yr. Obt. Svt.

W. BOURKE

U. S. Agt.

[fol. 278]

DEFENDANT'S EXHIBIT No. 130

Sava Sept 20, 1811

J. Halsted Esq.
Fort Hawkins

Dr. Sir

By Bazil Pinkertons waggon you will receive as per rec't enclosed Eleven Hundred twelve pounds Steel & Five Hundred twenty five pounds Iron being the whole of the Indian annuity for 1811 recd. by me—if found Correct I must request you to forward the usual receipts.

I have the Honor to be Dr. Sir

Yr. Mo. Obt. Svt.

J. W. BOURKE

U. S. Agt.

[fol. 279]

DEFENDANT'S EXHIBIT No. 131

Fort Hawkins 5th Octr. 1811

Mr. Thomas Bourke

Sir

Your letter of the 10th ultimo with its enclosures was recd. during my absence; so soon as all the annuity goods are recd I will forward a receipt for them.

I am respectfully

Your obt. servt.

JON HALSTED

[fol. 280]

DEFENDANT'S EXHIBIT No. 132

Fort Hawkins 11th March 1812

Gentlemen

On an examination by Mr. Nance of the Homespun delivered by you we find a difference of 2 yds. in quantity which will be accounted for by the annexed statement of differences, altho neither the packages nor quality corresponded with our agreement. I have concluded to take the 1000 yds. which I paid you for, the remainder being one hundred sixty three & ½ yd. I consider myself indebted to you for which being of a quality not corresponding with our contract, you will not expect to be paid for until sold.—

By yesterdays mail I recd. a note from Col. Hawkins informing me that the Upper Towns would be here on monday next to receive their annuity; with a request that I would inform Mr. Dale of it, as you have a claim against him would it not be advisable for you to obtain from him the draft or drafts that he has on their stipend, I suggest this for your government.—

If you have or can procure any more Homespun marked and measured as Mr. Nance knows will be necessary, I will endeavour to dispose of it for you.—

Yrs. &c.—

Randle & Philips J. HALSTED
U. S. factor

quantity of Homespun charged by Randle & Philips—	1165½
add this much short charged in measurement	9
	1174½

From which deduct

[fol. 281]

This much overcharged in addition of their bill	5	
ditto— do. in measurement	6	
		11
		1163½
one thousand yds. paid for —	1000	
to be paid for when sold	163½	1163½

[fol. 282]

DEFENDANT'S EXHIBIT No. 134

Fort Hawkins 7th July 1812

Sir

Enclosed you will receive two receipts one of the upper and the other of the Lower creeks chiefs for their annuity from the United States for the last year.—

I am respectfully

sir

yr. obdt. servt.

J. H.

Wm. Simmons, Esq.

Accts. War Department

[fol. 283]

DEFENDANT'S EXHIBIT No. 135

Fort Hawkins 16th Septr. 1812

Sir

The factor and myself having been much indisposed for several weeks has rendered it impossible to forward a report of this Trading House for the 2d qr. as early as might have been expected. I am so far recovered as I am in hopes to be able to complete them by the next mail— Mr. Halsted is so afflected with an inflmation in his eyes

that he cannot see to write or scarcely attend to any business.—

If you have not forwarded the goods ordered on 7th July last before this reaches you, it would be much to the advantage of the United States to receive them by the middle of December next when it is probable they can be sold for cash at a considerable advance as the cash part of the annuity will be paid about that time.— annexed you have a list of the goods above alluded to

Genl. John Mason
Supt. of Indn. Trade

I am respectfully
sir yr. obdt. servt.
Charles Magnan Asst.

---

2 ps. scarlet cloth cost 2 to 2.50
50 ps. good Romalls
20 groce saxon blue)
20 " green) binding
20 " red)
20 ps. white Homspuns
6 doz. shawls assorted some fashonable
100 3-pt. Blankets
100 2½ pt. Blankets
100 Bale strouds
10 ps. fashonable calico

1 Ream letter paper
2 doz. good Ink powder
5 " corn Hoes 10 Jack broad
2 " double bolted Pad locks
4 " " good at 1.75 per doz.
4 " Jack or pocket knives
4 " common Pen..D
2 " Rifle locks
5 " Looking glass @ 1 Dr. per doz.
300.m powder of D.P. & Co.

F. F. Gláse—

[fol. 284]

DEFENDANT'S EXHIBIT No. 136

J. Halsted Esq.
Fort Hawkins

Sir

Enclosed you will find receipts for Seven boxes, four kegs & 9753 pounds of Iron, being Indian Annuities rcd. from

Charleston, the balance will be sent tomorrow. I have received no Invoices.—or they should be sent—

I am with Great respect

Yr. Ob. St.

W. Bourke

ass. D. QM

Savannah 1 March 1813

[fol. 285]

DEFENDANT'S EXHIBIT No. 137

Fort Hawkins 27th March 1813—Sir—Yours of the 1st Inst. is duely received enclosing receipts for seven Boxes 4 Kegs and 8753 lb of Iron for the Indian Annuities. You mention in yours that there was 9753 of Iron, but this mistake arose from a wrong addition which appears on the back of the receipts, as the load accompanyg. the respective receipts corresponds with the weight. I am with regard & Esteem, your obt. Servt. (signed Jno Halsted U S Factor

Hon Burk Esqr Asst. D J M.

[fol. 286]

DEFENDANT'S EXHIBIT No. 138

Fort Hawkins 26th July 1813. Inclosed herewith I transmit to you an inventory of the public property at this trading house with a transcript of the day book, Journal and Ledger for the 1st quarter of 1813, and also the accounts of the Agent of Indian affairs.—

The factor having been much distressed with his eyes the sight of which h. not perfectly recovered has prevented my not fo. warding the accounts sooner.—

In perusing the transcripts you will observe it appears that there is a large balance of cash on hand, whereas the amount is all in stipend orders, received for goods sold

and entered on the books as for cash it having been customary at this trading house to take up these orders and on the Arrival of the annuity to retain payment.— I am respectfully &c. Charles Magnan Ass.

Gen. John Mason
likewise
the Sectry of the Treasury

[fol. 287]

DEFENDANT'S EXHIBIT No. 139

Fort Hawkins 2d Octr. 1815.—

Sir

I received yours of the 15th Septr. last and in compliance therewith I transmit you an Inventory of the Public property on hand at the Factory taken on the 1st of April last with duplicate transcripts of the day book, Journal and Ledger.—

There has been no further transactions since that date but the expences attendant in the care of the peltry which can be placed to Profit and Loss viz.—

My Salary from 1st Apl. to 30th Septr. p. 500 per ann.	$250.00		
Allowance in lieu of Rations	75.00		325.00
Wages to Jas. Horatio Renton for writing & attending to Peltry—6 mos. @ 30 dollars	180.00		
Allowance in lieu of Rations	75.00		
		255.00	
Wages for two negroes James & George for beating out the Insects from the skins for the last six months @ 10 dls. each	$620.00		
186 Rations @ 17 cts.	31.62	151.62	406.62
			731.62

You will see by the Inventory accompanying this that the Amot. of

U. S. property here is	$12007.66 1/12
From which deduct the above	731.62
	11276.04 1/12

The skin houses are much out of repair and will require considerable expence to pt them to stand thro. the ensuing winter. I am of an opinion that new houses should be built.—

The Balance due the Factory by the deceased Factor you will perceive amounts to $1926.22 7/12. I have received from his widow that amount on the Creek annuity which has been paid to the Indians by orders from Col. Hawkins I wish to be informed whether to hold these orders ntill the arrival of the stipend or return them & look to [fol. 288] the estate of the deceased for the amount. I wish to be informed as speedily as possible how I am to act.—

I am very respectfully

Sir

your obtd. Ser.

To Genl. John Mason

[fol. 289]

DEFENDANT'S EXHIBIT No. 140

Fort Hawkins 2d Decr. 1815.—

Sir,

Your Communication of the 24th Novr. ult. has duly come to hand in the absence of Majr. Dinkins who from information declines the appointment of U. S. factor which I expect you are aprised of ee'r this.— The Goods for the factory as mentioned in the invoice have not yet come to hand but as soon as received I will act as directed by your's.—

With regard to Stipend orders they are such as Col. Hawkins drew payable on the arrival of the Creek annuity which has not been paid since 1811 & Mr. Haisted accepted of & paid partly in goods from the Factory which he entered as sold for cash and partly from his private funds on the faith of the daily arrival of the cash part of the Creek annuity and you will observe from the last Transcript of the Books of the Agt. I. A. there is a considerable sume in that way to the amt. of nearly $5000.00 & the balance between that and the cash accot. on the Books of the Factory was coming to Mr. H.— he having exhausted all his salary for several years in honoring those drafts hoping to have payment out of the long expected annuity.—

With regard to the negro here being thought high I have this to say that they could not be procured lower; every negro in this neighborhood that could be hired were employed by the QM. & Ordnance Departments in the waggon yards and in cleaning of Arms @ 75 cts. per day & Rations & it was with difficulty I could procure the two I had.—

James H. Rentons labour was likewise necessary as well as my own superintdt for the six months from Apr. to Sept. as there was abundance of labour especially in this climate to preserve the skins having constant beating of them over & over which there was weather to admit.—

[fol. 290]

Respecting the credit given to the estate of Jona Halsted for furniture—I made the charge from a Letter of Genl Dearborns handed to me by his widow (allowing such a charge) accompanyd. by a minute of this charge made by the deceased but misunderstang. whether it would be admissible I thought it right to give the estate Credit for the amount subject to your better knowledge of the affairs of Indian Trade it can be withdrawn giving what you allow annually for that purpose—the charge against Mr. H. to my credit for 199.80\frac{3}{4}$ is certainly due to me for 4 qrs. ending 30th Sept. 1813 to 30th June 1814 which will appear from the transcripts already forwarded of those dates which sums were charged as cash paid to Charles Magnan —vizt.

Vizt. 1813	Septr. 30	$60.71¾
1814	Dec. 31	73.87½
	Mar. 31	44.15
	June 30	21.12½

I am very respectfully

your obt. Sert.

C. M.

Genl. John Mason

Superintdt of Indian trade

[fol. 291]

DEFENDANT'S EXHIBIT No. 141

Fort Hawkins 10 April 1816

Sir

You will herewith receive transcripts in duplicate of the Books of the U. S. factory up to this date. the Goods you wrote of addressed to Majr. Dinkins or to me, I have received of Mr. Thos. Bourke of Savannah.

Since my writing to you last answering your's addressed to me or to Majr. Dinkins I received a Letter from Majr. Woodruff stating that he was appointed as chief agent. I have been in suspence ever since & wish to know how to act in absence of the principle. I conceive myself entitled as confederated with him to sell and at least defray by the profits of the goods on hand my own Salary and not be an unprofitable expence to the U. States.—

The skin houses as I have represented have been in very bad repair by which I have lost a quantity of skins on account of your not giving me instructions to build others which I wrote was requisite besides the Military here have frequently broken them open and ransacked everything. the locks that have been broken has cost considerable expence and altho I have applied to the Comandg Officer frequently for a guard I have not been able to obtain one.—

For the time I have had charge of the Factory I have had nothing to trade but deer skins part of which I have had to sell to pay my own salary and the expences contingent on taking care of the remainder.—

I flatter myself that from the receipt of the goods to this factory I will be able to revive the trade with the Indians [fol. 292] as they are much imposed on else where and be able to answer to the U. S. for my attention & perserverance which in this capacity I am now in. I have served them ever since I resigned my apptmt. of 2d Lieut. in the Army 9 years ago.—

Upon opening the goods a few days ago I find a mistake. No 6 a Tierce invoiced .67 pce. Custahs and 1 ps. Blue Gurnahs—Whereas No. 6 received contains 1 pc. Red scarlet cloth, 8 pcs. Hdkfs, 9 printed Guerah counterpeny, 2 pcs. Blue cloth, 4 pcs dark printed Guerahs, 10 ps. Red dos, 15 duffle Blankets.

The above goods I will sell to the best advantage but keep them distinct from those appropriated to this place their destiny being as I presume intended for another Trading house in place of those marked No. 6 in the invoice to this factory. It will be necessary that an invoice of their cost should be forwarded here that the U. S. may get credit for them.—

The Indians have just received a great quantity of goods from the Agt. I. As. therefore the sale of the goods come to hand will be slow for sometime especially at this season when they have neither furs, deerskins nor hides to barter nor necessity for warm clothing. Other articles than those send would have suited better at this time of the year such as Homespun some groceries powder & Lead however homespun, powder and lead can be procured here to advantage for cash which I have not got.—

Col. Hawkins expects daily the cash part of the Creek annuity upon the arrival of which I will receive the amount due to the U. S. Trading house by deceased factor's stipend orders likewise what is due on the Factory Books from the Creek annuity and several Chiefs amounting to $2934.93 viz—

[fol. 293]

Estate of Jon. Halsted	$1926.22	7/12	
Long Lieut	32.50		
Wm. McIntosh	3.72	1/2	
George Lovet	11.43	3/4	
Little Prince	100.00		
Big Warrior	29.00		
Creek annuity	832.64	1/4	2934.93 yr.

I am just sending off all the deer skins at this place according to your order but I suspect they will come far short of the weight supposed on account of their being weighed in a green state when received & have been drying some of them for twelve years on hand & have been beat over every season at least twelve times by which they lose many pounds each beating.—

The principle part of the skins sent off are excellent part are indifferent but I expect in general all merchantable the proceeds of which I wish to be acquainted with that I may give peltry its credit tho expect is is a losing concern for several years back.

This post at the present time is not suitable for Indian Trade—there are so many settlers at the different posts in the nation where the troops are stationed that the Indians will give double price for goods there and sell their skins, hides &c. at half their value rather than come to this distance. Fort Gains a few miles below Fort Mitchell on the Chatehooche would be a central site for the trade provided there was a suitable assortment and the removal would meet with your approbati n to which it is submitted.

I respectfully &c.

C. M.

Genl. John Mason
Suptd I. Trade
G. Town
Dist. Columbia

[fol. 294]

DEFENDANT'S EXHIBIT No. 147

To J. Mason—Superint. Ind. Trade

Ocmulgee—U.S. Trad. House

March 10th. 1808

Sir

I herewith transmit to you an Inventory of all the Public property at this Factory, with a Transcript of the Day Book & a Statement of the Accounts from 1 st. Novemb. to 31st. Decemb. 1807 inclusive, in the form hitherto prescribed. My next & insuing reports (commencing with the present year) shall be in conformity to your late instructions.

I would draw your attention by reference to my letter of 19 th April 1806 directed to William Davy Esq. & of 18 th. June 1807 to Genl. John Shee, & to a conversation which passed between the Secretary at War & Col. Hawkins, which the former may recollect, together with other communication & documents which I presume are in your Office; to a circumstance relating & interesting to this Trading House, which by some neglect or over-sight has hitherto been suffered to lie dormant. by such reference you will discover that this Factory should have been creditted with the sum of ten thousand dollars relinquished by the Indians from the price they were to receive for lands sold in the year 1802, for the satisfaction of debts due by Indians & Indian Countrymen to this Factory. Such deduction having been made by Government in their payment for lands then purchased, it followed of course that debts, to the amount of that sum, tho' not individually to this Factory, had been collectively paid to Government; but Government having failed to give this Factory credit for that amount, Indi-
[fol. 295] viduals of the Indian Nation stand unjustly charged on these Books, & this Factory through them to Government.

This House is very much in want of the following Articles; to which I must beg your attention as early as practicable—viz.

25 ft. Blue Srouds
1 " Sup. Navy blue cloth
1 " White Plains
100 " Romals
2 " White Cotton Cambrick (good)
4 " Coloured ....
2 Bundles Indian
4 doz. Cotton Stocking (apart)
2 ft. Bandano Hdkfs.
10 Col. Thread
10 " White — from No. 6 to 15
25 ft. Light blue Binding) Noothin)
))
25 " .....) Colours)
6 ft. Ribband (apart)
20 " Calico, apart, mostly blue
20 " Indian Calico
10 doz Looking Glasses from 8 to 10 cts
3 " Ivory combs
3 " Wool Hats

2 Rms. Foolscap Paper
1 " Letter ....

½ doz. Women's Saddles
3 " Rifle locks
150 Silver Boots
2 doz. dbl. bolted pad locks
2 ..... single .....
5 ..... Small brass Bell
4 .... Kettles from 1 to 2
6 ..... Iron Spoons
4 "
4 " Bailow Pen Knives
2000 Fish Hooks, (assort.)
18 Pepper
5 doz. Mustard
150 Sugar
2 — brown .....
500 lb Coffee
½ Chist / Skin Tea
4 boxes Soap
5 doz. Blk. Silk Hkfs. (low prized)—

[fol. 296] In the above enumeration you will discover a few articles not wholly adapted to the trade of Indians. These are now particularly desired for the purpose of selling to white People for Cash, and exchanging with them for Homespun, a very desirable Article in Indian traffic.

It is presumed that the Peltry which has been sent from this since the commencement of the year (amounting to upwards of nine thousand pounds of Deer Skins 2000 Smal Furs & 112 Otters) will answer full remittance for the above mentioned Articles: If not, they with the above mentioned

$10,000.00, with which I rest confident this House will be creditted will certainly far exceed such expenditure.

I am Sir very respectufully yr. obt. Servt.

J. Halsted US Factor

[fol. 297]

DEFENDANT'S EXHIBIT No. 148

Col. Hawkins to J. Halsted—relative to a balance due the trading House from the U. S.

Creek Agency 3 Augt. 1808

I have recd & return by W. Foster the letter of Genl. Mason to you of 3d of June. Your trading house should have recd. a credit of 10,000 dollars for the debts due it and agreed to be paid by the Creek Nation in their treaty at Ft. Wilkinson and so expressed in that Treaty. There is a further balance due your house during the time of your predecessor Mr. Price. I do not recollect the amount but it was considerable & can be ascertained by an inspection of the settlement of my accounts with the account of the War Department which I will explain. Mr. Price acted with my department "pro Agent of War" was paymaster to my Department; he kept an account a/c and received from time to time payment in bills on the Secy at War. The a/c with the receipts at the bottom was sent on by me as a voucher. The bills had never been received at the War office of course not paid.

In the settlement with me I was debited for all bills and received a credit for these Vouchers which left a large ballance in my favour. This I refused to receive as having no claim to it, and it was a considerable time before Mr. Wagner and I could find out where the errow was. When we found it I stated that the factory should be credited with the amount of these accounts current and a note made to explain the transactions if ever the bills come to light and the accountant told me it should be done

[fol. 298]

DEFENDANT'S EXHIBIT No. 152

We the chiefs of the Lower Towns acknowledge to have received in open council of Lt Col. John J. Abert the sum of Twenty Thousand Seven hundred fifty dollars, being our part of the annuity for the year 1832

Creek Agency July 1.st 1833.

$20,750.	Neah Micco	his x mark
Duplicates	Tusk Ke haire nea	his x mark
	Cotch e Tustenaggie	his x mark
	James Island	his x mark
	John Sticthum	his x mark
	Jacob Beavers	his x mark
	Tuckebuchie Haiji	his x mark
	Huica Mart clu	his x mark
	Fos hutch Ematha	his x mark
	Major Barnard	his x mark
	Tomah Mrico	his x mark
	Gaf Ke mula Harjo	his x mark

Signed x paid in our presence

/s/ Leonard Tarrant

/s/ Nathan Rice

/s/ B Hepburn

Interpreters

/s/ Puddy Curr

/s/ B. Marshall

[fol. 299]

DEFENDANT'S EXHIBIT No. 153

We the Chiefs of the upper Towns acknowledge to have reed of Col J J Abert Special Commissioner the amount of the annuity paid the creek nation ..... Twenty Thousand Seven Hundred fifty Dollars paid in open council ..... July 1833

Tuck a batchie mico	his x mark
Ni hou lick hoti	his x mark
Coor a Tustanaffin	his x mark
Tustanaffin Eniasthan	his x mark
William Mc Gelrery	his x mark
David Barnett	his x mark
Sallatlir	his x mark
Tus hatch cha Tusin	x mark

Singed x paid in our presence

/s/ Leonard Farrent
/s/ Nathan Rice
/s/ B Hepburn

Interpreters

/s/ B Marshall
/s/ Puddy Carr

[fol. 300]

DEFENDANT'S EXHIBIT No. 154

Fort Mitchell Ala.
February 28.th 1833

Sir

Your letter of the 12th of January last was not received until the 21st Instant. I set out Immediately for this place, have had an interview with Colo. Crowell he has not obtained any Indian Youths for the Choctaw Academy, he

says he mentioned the subject to the Chiefs at their late assemblage, and that they refused to furnish the Youths required until the Government should comply with some of the stiputations of the Treaty which they Alledged had not been complied with. I shall endeavour to see Ne he ha Micca the Head chief of the Creeks before I leave and urge upon him the necessity of a speedy compliance on the part of his people by convincing him if I can that It is much to the interest of the Creeks that their children should be educated, and that in refusing to comply they only injure themselves, and cannot in any manner affect the government, as it is now manifest that the government is ready and willing to carry into effect this part of the treaty. he is however not at home and If I cannot see him before it is necessary for me to return home. I will write to him and converse with such other of the chiefs as I can get to see, and inform the Department of the result as soon as practible.

If I cannot do anything in this way satisfactory It would perhaps be better for the Department to require the assem- [fol. 301] blage of the chiefs, or should the Department require their assemblage on any other occasion at any time shortly. This subject I trust might be successfully urged upon them.

I received a letter some time since from Colo. King,[1] who had at my request applied to the Department to grant me the privilege of selecting my own place of residence in the Creek Country, in which he states that that liberty would be allowed me, I am therefore preparing to settle in Talladega County at Sumpers springs where there is a Post Office in the rout through that part of the Creek Country, letters hereafter Directed to me at that place by way of Newman in Georgia would be much sooner received please send them that way.

I have the honor to
be most respectfully
Your Obt Sert
/s/ Leonard Tarrant

Elbert Herring Esqr

[fol. 302]

DEFENDANT'S EXHIBIT No. 155

Talladega County Alabama

Sumper's Springs April 26th 1833

Sir

In reply to my last application to the Creek Chiefs for the youths which the Department was desirous should be sent without delay to the Choctaw Academy. I have received a letter a copy of which I herewith transmit to the department.

Tuchabatchy April 16th 1833

To Leonard Tarrant Sub Aquet of the Creeks

Sir we received your letter by an upper town chief concerning the thirteen boys that the Secretary of war wants to have educated at the Choctaw School we have so much on our minds at this time and we have not got our reserves Yet we have concluded not to send any. we may perhaps have a school at home and give them a education.

from your friends

his
Tusknahaw x
mark his
Opithlerholer x
his mark
Little x Doctor
mark
his
Mad x Blue
mark

Witnep Barent Dubois

I have been once to Fort Mitchell. I have written at different times two letters to the Headmen and Chiefs and have had frequent conversations with the upper and lower chiefs on the subject. at one time they assign as a reason

why they do not furnish the boys that the $100,000 is not [fol. 303] paid at another that they have not got their reserves yet. and finaly that they wished to send their children nearer home and complain of the treatment their children received at the Choctaw Academy and say they returned home but little improved.

I have frequently answered all those ob[illegible]tions except the last apparently to the satisfaction o[illegible]ose with whom I have conversed. I am confident I should have succeeded before now if it had not been for the interference of designing white men, who are much Displeased at the course I am pursuing with the Indians. and notwithstanding I have informed the Indians that no other Disposition of the three thousand dollars which will be anually appropriated for the Education of Creek children will be made. Yet they are persuaded by those designing men amongst themselves. and us that many may be appropriated to the establishment of schools nearer home and while ever they believe any other disposition of the money will be made they will not send or furnish the youths. I have on all occasions in my intercourse with the Indians endeavoured to impress on their minds, what I sincerely believe myself to be true. that the government and particularly the President and the department are extremely Solicitors for their welfare and happiness. and that acceeding to the propositions of the department they would always find it much to their advantage. that designing and artful men who speak evil of the government and its course towards them, are seeking their own advantage and that unfortunately for the Creeks they will not discover their designs until It is too [fol. 304] late to profit by the discovery. This advice I know to be true yet It gives great offence to many in and out of the creek country.

I am Respectfully

Your Obt.

Servant

/s/ Leonard Tarrent

Elbert Herring Esqr

[fol. 305]

DEFENDANT'S EXHIBIT No. 156

Talledega County

Mardisville Sept 4th 1833

Sir

I attended at the request of the upper Town Chiefs, a council held at Tuckabatchu last week. The object of their meeting was to come to some determination sending their children to school, to talk about the Treaty, and to inform the Indians what disposition they had made of the money which the Head chiefs had received at Fort Mitchell, and which had been brough to Tuchabatchu. They requested the attendance of the lower chiefs; but they failed to attend. Major Broadnax was there and endeavoured to get the chiefs to send a delagation to Washington to sell their reserves.

With regard to schooling their children, they expressed a great unwillingness to sending them to the Choctaw academy in Kentucky, and requested me to inform the President, that they wanted the school fund equaly divided between the upper and Lower Towns, and a school to be established at some place in the upper Towns, half way between Talladega and Tuchabatchu. The place to be designated by themselves. They farther requested me to state to the President that they do not want their children to be taught how to work at the schools that they can learn them to work themselves, but that they wanted a teacher who would be vigilent and industrious and competent to learn their children. Major Broadnax stated that It was also the wish of the Lower chiefs, that, the money should [fol. 306] be divided and that they wished to send their children to a school to be established in Georgia, in the county contiguous to the creek country, and stated that favourable propositions had been made to the lower Towns by some person on that suiject.

They appear to be much dissatisfied at the instructions I have received, with respect to their reserves &., and Apoethlahola, argued, that by the provisions of the Treaty

the President had obligated himself to remove all the white people out of the nation, and not those only who had taken Indian improvements, he contended that the Indians had a right to make their own improvements and that they were directed to select good land and that they should be entitled to it. I stated to him the Presidents views of the subject and told him he must be mistaken and refered him to that part of the fifth Art. of the Treaty which excepted those white persons, who had made their own improvements, and then stated to the council that I was authorised by the Department to state to them that Government would with perfect good faith fulfil all the treaty stipulations, and again assured them that they might fully rely on the Government for the performance of their part of the obligations contained in the Treaty, and that it was entirely useless for them to contend about the matter now, as such and such were my instructions and they might be assured that those instructions were in accordance with the Treaty, and would be strictly attended to, and carried into effect. [fol. 307] At this time Major Broadnax desired to speak I did not object. he stated that he was a witness to the treaty, and had heard the President promise the chiefs that all the settlers in the Indian country should be removed, and that he did say that the Indians might select good places and that they should be located for them. I was much astonished at his remarks and replied to him sharply and again stated my instructions to the Indians and the manner in which they were to be located, & who were considered Intruding. I was not at all surprised at the observations of Apoethlahola as I considered It a stroke of Policy on his part in order to reconcile the Indians to him, as they had threatened his life. In a conversation with Major Broadnax after the alk was over, he maintained the position he had taken before the council, and said that in a private council with the chiefs the evening before he had urged them to send a Delagation to Washington to Dispose of their reservations, and that the chiefs had complained that the Government had deceived them and that he had acknowledged It, and told them It was needless to rely on the Government, that the President

would not remove the Intruders that he would not shed the blood of his white children and that the Intruders would not leave the country without a contest, and on these grounds urged them to send a delegation to Washington.

As I had no instructions on the subject I did not publicly urge them to send a delegation to Washington, but privately suggested to them that If they would send a delegation properly authorised to sell their lands that I believed the Government would recognise the Delegation and pur- [fol. 308] chase their lands, to this I received no answer and Broadnax says they replied to him they had no land for sale. I considered It my duty to inform the Department of the conduct of Major Broadnax, not that I am of opinion that any further notice should taken of It, but merely that the Department might know what did transpire at the council. Broadnax has been Influential with the Indians and still retains some influence with the lower Chiefs, other men exercise a considerable influence over the upper chiefs. The Indian Treaties and laws regulating Indian affairs were duly received by the last mail, and also your letter of the 9th of August with the Enclosed papers, which shall be as soon as possible attended to. Joseph Bruner has selected a half section of Land at or just above Fort Tasllv what is now called the Talladega Battle ground a town is laid off at the place, and several persons have purchased lotts and built upon them. I wish It to be understood I had no hand in making the selection, and have no doubt but It was done by Wm. More and other Speculators, please inform me If Joseph Bruner will be allowed to locate his claim there or whether he will be required to take his reservation in the town in which he lives, as the Treaty does not specify where he shall take it.

I am Respectfully

your Obt Servt

/s/ Leonard Farrant

Elbert Herring Esqr

[fol. 309]

EXCERPTS FROM DEFENDANT'S EXHIBIT NO. 159

INDIAN TREATIES.

TREATY WITH THE CREEK NATION.

JULY 10TH, 1861.

A TREATY OF FRIENDSHIP AND ALLIANCE,

Made and concluded at the North Fork Village, on the North Fork of the Canadian river, in the Creek Nation, west of Arkansas, on the tenth day of July, in the year of our Lord, one thousand eight hundred and sixty-one, between the Confederate States of America, by Albert Pike, Commissioner, with plenary powers, of the Confederate States, of the one part, and the Creek Nation of Indians, by its Chiefs, Head Men and Warriors in General Council assembled, of the other part.

* * * * * * *

[fol. 310] *Annuities and interest thereon.*

ARTICLE XLI. It is further ascertained and agreed between the parties to this treaty, that the United States of America, of which the Confederate States of America were heretofore a part, were, before the separation, indebted, and still continue to be indebted to the Creek Nation, and [fol. 311] bound to the punctual payment to them of the following sums annually, on the first day of July of each year, that is to say:

* * * * * * *

For interest and arrearages on the said sum of two [fol. 312] hundred thousand dollars, provided to be invested for purposes of education by the sixth article of the treaty of the seventh day of August, A. D., one thousand eight hundred and fifty-six, which has never been invested, and the five instalments of interest whereon at the

rate of five per cent. per annum, due up to and upon the first day of July, A. D., one thousand eight hundred and sixty-one, amount to the sum of fifty thousand dollars, whereof twenty-one thousand dollars only has been paid, the sum of twenty-nine thousand dollars.

* * * * * * *

[fol. 313]

EXCERPTS FROM DEFENDANT'S EXHIBIT NO. 160

PROVISIONAL CONGRESS. SESS. V. CH. 27. 1861.

1861, Dec. 24. CHAP. XXVII.—*An Act making appropriations to comply in part with treaty stipulations made with certain Indian Tribes.*

* * * * * * * *

Creek Indians. * * *

* * * * * * * *

For interest for the year eighteen hundred and sixty-one, (under article forty-one of said treaty,) and arrearages of same on the sum of two hundred thousand dollars, in the treasury of the United States, and which should have been invested for educational purposes, twenty-nine thousand dollars.

* * * * * * * *

[fol. 314]

DEFENDANT'S EXHIBIT No. 167

Treasury Department, C. S. A.
Second Auditor's Office,
Richmond, Va. Dec. 31st 1861.

Sir—

The Treasurer of the Confederate States will remit to you the sum of Six hundred and eighty one thousand eight hundred & sixty nine 15/100 dollars, being the amount of Requisitions Nos. 2175, 76, 77, 78, 79, 80, 81, 82, 83 & 84 issued in your favor on the 20th Instant, with which you are charged on the Books of this Office, on account of the following Appropriation, to wit:

"An Act making Appropriations to comply in part with Treaty Stipulations made with certain Indian Tribes," as per Act

Requisition No.	2175	For contingency of Superintending & Agencies				$ 3,500.00
Do	2176	"	Sundry Appropriations for Cherokee Indians			237,944.30
Do	2177	"	Do	Do	" Seminole Indians	61,450.00
Do	2178	"	"	"	" Choctaw & Chickasaws	115,126.80
"	2179	"	"	"	" Creek Indians	72,950.90
"	2180	"	"	"	" Camanches	64,862
"	2181	"	"	"	" Reserve Indians	82,94
"	2182	"	"	"	" Seneca & Shawneey	11,962
"	2183	"	"	"	" Quapaw Indians	9,
"	2184	"	"	"	" Osage Indians	22,568
					Total	$681,869.15

The Treasurer will advise you when the same has been placed to your credit on his Books, or hand you a Draft for which you will please [fol. 315] forward a Receipt to this Office, specifying therein the date, number and amount of said Requisition.

I am, very respectfully,
Your Ob't Serv't,
W. H. S. Taylor
Auditor.

To Genl. Albert Pike,
Agent for the War Department, for delivery of the above funds to Elias Rector Supt. Ind. Affairs,
now in Richmond, Va.

[fol. 316]

DEFENDANT'S EXHIBIT No. 168

WAR DEPARTMENT

Richmond December 30th 1861

$72,950 No. 2179

TO THE SECRETARY OF THE TREASURY

Sir:

Please cause a WARRANT, payable out of the undermentioned appropriation, to be issued for the sum of Seventy two thousand, Nine hundred and fifty dollars, in favor of General Albert Pike, Agent of War Department for delivery of said sum to Elias Rector Superintendent of Indian Affairs with which said General Albert Pike is to be charged accordingly on the books of the Treasury.

I. P. Benjamin
SECRETARY OF WAR

COUNTERSIGNED, Dec 31

LEWIS Cutsser
COMPTROLLER

REGISTERED, Dec 31st

W. H. S. Taylor
AUDITOR

"An Act Making appropriation to comply in part with Treaty stipulations made with Certain Indian Tribes"

Creek Indians

For Perpetual Annuities for the year 1861	24,500.00
Interest for the year 1861 & Arrears of same on $200,000	29,000.00
Annual Provision for Education for 1861	7,000.00
Annual Provision for Wagon Makers for 1861	11,460.00
Compensation of Delegates	750.00
Uniforms for	240.00
	72,950.00

REGISTERED

[fol. 317]

EXCERPTS FROM DEFENDANT'S EXHIBIT NO. 169

War
appropriation
Warrant
No 16

Confederate States of America

To The Comptroller & Register of the Treasury

Congress haveing by an act entitled an act makeing appropriations to comply in part with treaty stipulations made with certain Indian Tribes

Approved Dec 24/61

[fol. 318] Made the following appropriations Viz For Creek Indians For perpetual ammuties for the year Eighteen hundred and Sixty one under article 41 of treaty made with the Creeks July 10th 1861 $24,500

For Interest for the year 1861 under articl 41 of Said treaty and arrearages of same on the Sum of $200,000 in the Treasury of the United States and which should have been invisted for Educational purposes 29,000

• • • • • • •

[fol. 319] And for so doing this Shall be your Warrant Given in duplicate under my hand and the seal of the Treasury Department this Eight day of January 1862

C. G. Memmenger
Secretary of the Treasury

[fol. 320]

DEFENDANT'S EXHIBIT No. 170

Confederate States of America,
War Department, Office of Indian Affairs,
Richmond, Jany 1st 1862.

Major Elias Rector,
Superintendent of Indian Affairs,
Fort Smith, Arkansas

Sir:

An Act was recently passed by the Congress of the Confederate States, and approved December 26th 1861, "making appropriations to comply, in part, with Treaty stipulations made with certain Indian Tribes." The whole amount appropriated by this Act was six hundred and eighty one thousand, eight hundred and sixty nine dollars, and fifty cents.

By sundry requisitions of the Secretary of War upon the Secretary of the Treasury, this sum has been placed in the hands of General Albert Pike, for delivery to you, as Superintendent of Indian Affairs.

Herewith you will receive Tabular Statements, marked Numbers (1) and (2) for your information and guidance, as to the times, manner, &c., that this money is to be disbursed.

You will perceive from these statements, that one hundred and nineteen thousand, three hundred and forty dollars can be used, for the purposes indicated, immediately, or, whenever, it may be deemed essential by you; while the residue, amounting to five hundred and sixty two thousand, five hundred and twenty nine dollars and fifteen [fol. 321] cents, is dependent, for its disbursement, upon the ratification of the Treaties, as amended by, by the several Indian Tribes.

Very respectfully,

S. S. Scott
Act'g Commr of Indian Affairs

[fol. 322]

DEFENDANT'S EXHIBIT No. 173

Little Rock, Ark.

28th January 1862

Dear Rector

I will leave here on Friday morning. It will take me, I suppose, six days to reach Fort Smith with the money. This will bring me to the 5th, 6th or 7th of February.

I have $265.927.50/ in specie, all in gold except $65.000 in silver. Of course I must stay with it. I think I can make the journey, though in six days.

I think you had better go up to my head Quarters immediately, and arrange to feed the Comanches and others if they come there; and keep them there until I reach the place. I can take the money there, and send by the same messenger who takes this, to Colonel Cooper for an escort.

"The Treasurer of the Choctaws means to sell the coin his people get, buy Confederate paper, and put the difference in his pocket. We must stop that. I think the best way will be for you to notify the Chief, Hudson, the amount to be paid in coin, and that you will pay it to the Treasurer only in the presence of three Commissioners appointed by himself.

If you can pay the Choctaws and Chickasaws at my Head Quarters, it will of course be much better.

I have had to ask the *immediate* removal of Leeper, and the appointment of Col. Pulliam in his place. This I have done today, sending extracts from your letter, Charley Johnson's and Quesenbury's.

[fol. 323] The Secretary is also advised, now, of Garrett's continual intoxication.

Why do you not demand his removal, and name a person for his place?

I don't believe Col. Cooper will be removed. The President said in my presence, "Now that he Choctaws have a Delegate in Congress, what need of an Agent?"

About 150 gamblers are here, following up the Indian moneys. I enclose an order requiring passports, that will keep them out of the Nation.

I have the $150,000 advance for the Cherokees, the $12,000 due the Nation, and the $10,300 due the Treaty party or Stand Watie's,—all in paper. Also the $50,000 advance for the Choctaws. In paper and specie, I have for you $681,000 and over.

Have you received the money, (some $3,000) that I asked should be sent you to pay expenses of the new Indian Councils?

If you *cannot* go to Head Quarters immediately, you will have to send some one, and let him and Colonel Cooper keep the Indians contented

Always yours

Albert Pike

Maj- E- Rector.

[fol. 324]

DEFENDANT'S EXHIBIT No. 175

Dist Ind Terry

Fort Washita May 15 65

Gen.

Having been informed by Wm E. C. Boudinot that he had brought out for your information copy of an Act of Congress providing for the payment of the annuities for the present year to the Indians in alliance with the C. S. in at its *specie* valuation, I have directed Col. George Wissinger Act'g A.D.C. to proceed to Shreveport to confer with you on the subject & arrange for the delivery of the cotton to the Treasurers of the different Tribes.

Col. Weissinger will present a schedule made out from the stipulations of the Treaties, showing the amt due each Tribe. He is also instructed to confer with you relative to the condition of the Indians—destitute as they are of breadstuffs. Their condition is such that unless some provision is made for them great suffering and perhaps many deaths must occur for want of food.

I have advised the Treasurers of the several Nations to take immediate steps to reduce to possession such cotton

as you or Mr. Gray may be willing to turn over to them. This should be done without delay as there necessities are pressing & moreover to defer the payment might be to defeat it altogether.

I am Gen Gray resfy yr obd svt

D. H. Cooper Brig Gen
& Supt Ind Affairs

Gen E. Kirby Smith
Com of F. M. D. Shreveport

[fol. 325] [File endorsement omitted]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION, Plaintiff,

—v.—

THE UNITED STATES, Defendant.

FINDINGS OF FACT—February 18, 1959

The Commission makes the following findings of fact:

1. The Plaintiff, the Creek Nation of Indians, is a tribe of American Indians within the meaning of the Indian Claims Commission Act, and as such is authorized to bring this cause of action under Sec. 2 of said Act. This claim is not included in any suit pending in the Court of Claims or the Supreme Court of the United States, nor was it pending in the Court of Claims under any legislation in effect on the date of approval of said Indian Claims Commission Act (Pltf's Req. Find. No. 1 and Dft. Req. Find. No. 1).

2. Plaintiff asserts a claim in law under Clause (1), Sec. 2, Indian Claims Commission Act. The claim is in the nature of an action of debt asking payment for sums al-

legedly owing and unpaid and obligations unfulfilled, due plaintiff under Treaties of 1802, 1805, 1832, 1833, and 1856.

3. The relation of guardian and ward as between the plaintiff and the defendant has not been established by competent or relevant evidence.

[fol. 326] 4. Article II of the Treaty of June 16, 1802 between the Creek Nation and the United States, proclaimed January 11, 1803 (7 Stat. 68) provided in part as follows:

> The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars of the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek Nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colorain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.
> • • •

Article IV of said treaty provided:

> The contracting parties to these presents, do agree that this treaty shall become obligatory and of full

effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof.

This treaty became effective on January 11, 1803, the date of its proclamation by the President. Thereunder the United States was obligated by the above treaty stipulation to pay said perpetual annuity of $3,000.00 per annum beginning with the year 1803 through the fiscal year 1902 (Cl. Ex. 1, pp. 131, 708), when this permanent annuity was funded under the Act of May 27, 1902 (32 Stat. 249)—a period [fol. 327] of 100 years, less the Civil War period of six years (fiscal years 1862 through 1867),* leaving a net obligation of the United States to pay said permanent annuity to the Creek Nation over a period of 94 years at $3,000.00 per annum, or a total obligation of $282,000.00, under the above Article II.

The total obligations of the United States under said Article II for which this claim is based are set forth as follows:

Permanent annuity of $3,000.00 per annum for 94 years	$282,000.00
Annuity to chiefs, $1,000.00 per annum for 10 years	10,000.00
In goods and merchandise, receipt of which was acknowledged	10,000.00
To satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States	10,000.00
To satisfy claims for property taken by individuals of the Creek Nation, from citizens of the United States subsequent to the Treaty of Colerain	5,000.00
	$317,000.00

* The Creek Nation has eliminated any claim in this case for annuity payments due from the United States during the Civil War period, or for the fiscal years 1862-1867, 6 years, this period being covered by separate petition in Docket No. 274 (R. 3).

The defendant agrees that the obligation of the United States under the provisions of the aforesaid treaty is the amount of $317,000.00 as hereinabove stated.

Plaintiff admits the payment and disbursement by the United States to the Creek Nation on said treaty obligation and in the amount of $254,690.25 (as itemized in its Req. Find. No. 4) and claims a balance due under said treaty obligation in the amount of $62,309.75.

[fol. 328] The General Accounting Office report shows that unallocated payments and goods of the value stated were paid and forwarded to the Creek Indians within the years stated as follows:

Year	Value of Goods	Remarks
1803	$ 3,000.00	Annuities for Creeks
1803	1,008.08	Goods for Creek Chiefs
1804	4,150.84	Annuities for Creeks
1804	1,100.07	Goods for Creek Chiefs
1805	4,000.24	Annuities for Creeks
1805	500.16	Goods for Creek Chiefs
1805	4,000.00	Annuity for year 1805
1806	6,000.50	Annuity for year 1806
1806	6,673.85	Annuity for year 1806
1807	1,000.08	Goods for Upper Creek Chiefs
1807	499.05	Goods for Lower Creek Chiefs
1807	6,025.06	Annuity for Upper Creeks
1807	5,999.39	Annuity for Lower Creeks
1808	7,646.46	Annuity for Upper Creeks
1808	8,250.45	Annuity for Lower Creeks
1808	501.38	Goods for Lower Creek Chiefs
1808	499.90	Goods for Upper Creek Chiefs
1809	500.41	Goods for Upper Creek Chiefs
1809	348.98	Goods for Lower Creek Chiefs
1809	7,300.40	Annuity for Upper Creeks
1809	7,749.64	Annuity for Lower Creeks
1809	508.51	Annuity for year 1809

These unallocated goods forwarded amount to $77,263.45 and consist of $71,305.34 in annuities and $5,958.11 to Chiefs for the period 1803-1809, inclusive (Dft. Ex. 142, p. 103)

These disbursements are disbursements which the General Accounting Office cannot definitely and clearly identify

as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805.

In addition to the foregoing goods forwarded, which the report does not allocate to any treaty stipulation due (Says General Accounting Office) to incompleteness of records, said report shows additional disbursements for the benefit of the Creek Indians for purposes stipulated in various [fol. 329] treaties with the Creeks, which the Accounting Office says cannot be identified as having been disbursed in fulfillment of any particular treaty and are, therefore, not allocated to any specific treaty as follows:

	1811	1815	1817	1818
nuity, goods	$3,350.00	$4,300.00		
nuity, cash				$6,547.00
ims (depredations)			$2,000.00	5,801.00
h payments to Chiefs	200.00			

These disbursements amount to $22,198.00 and consist of $14,197.00 annuity disbursements, $7,801.00 claims and $200.00 payment to Chiefs. (Deft. Ex. 142, pp. 685-689)

5. Article III of the Treaty of November 14, 1805, between the Creek Nation and the United States, proclaimed June 2, 1806 (7 Stat. 96, 2 Kapp. 85), provided as follows:

> "It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Ocmulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonally signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the terms of the ten succeeding years, making in the whole, eighteen payments

in the course of eighteen years, without interest. The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

Article V. of said treaty provided in part:

"* * * and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Said treaty became effective on June 2, 1806, when proclaimed (2 Kapp. 85).

[fol. 330] The total obligation of the United States to the Creek Nation under said Article III was as follows:

$12,000.00	annually for 8 years in money, or goods, and implements of husbandry, at the option of the Creek Nation	$ 96,000.00
$11,000.00	annually for 10 succeeding years, to be paid in like manner	$110,000.00
	Total obligation	$206,000.00

The report of the Accounting Office shows annual appropriations to fulfill the above obligation, but disbursements definitely allocated to the fulfillment of the obligations of this treaty are in the amount of $169,452.25.

The defendant admits the obligation under said treaty to be in the amount of $206,000.00 as above stated. The unallocated disbursements by defendant, as stated in the preceding finding, in the total amount of $99,461.45 is in excess of the amounts claimed by the plaintiffs as being due and unpaid under the obligations of both the Treaties of 1802 and 1805.

6. Under Article XIII of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366), it was provided that $3,000 should be expended, as the President might direct, for the term of twenty years

for teaching plaintiffs' children. The total obligation of the United States to the Creek Nation under said Article XIII amounted to $60,000.00 This is agreed to by defendant.

Article 4 of a Treaty of January 4, 1845 between the Creek Nation and the United States (9 Stat. 821) provided for an additional annual annuity by the United States for the purpose of education of the children of plaintiff in the amount of $3,000.00 per year should be allowed for a term of twenty years and that the annuity of $3,000 per year provided in the Treaty of 1832 should be continued [fol. 331] until the termination of the educational annuity provided in said 1845 treaty.

Article 5 of the Treaty of August 7, 1856 between the United States and the Creek Nation (11 Stat. 699) amended and continued Article 4 of the Treaty of 1845 (and the Treaty of 1832) by providing for an annuity of $6,000 per annum for education for seven years.

The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's Ex. 185, 186) in fulfillment of the obligations of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

7. Article V of the Treaty of February 14, 1833 between the United States and the Creek Nation (7 Stat. 417) provided in part as follows:

> "As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker,

as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the [fol. 332] interest and welfare of the Creek Indians: And the United States will also cause to be erected, as soon as conveniently can be done, four patent rail way mills, for grinding corn; and will immediately purchase for them twenty-four cross-cut saws. * * * "

Article IX of said treaty provided:

"This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

This treaty became binding upon the parties on April 12, 1834, when proclaimed (2 Kapp. 388).

Petitioner contends that the obligation of the United States under said treaty was for a period of 39 years (omitting the Civil War years) at $2,710.00 per annum or a total obligation of $105,690.00; and that the report of the General Accounting Office showed expenditures in fulfillment of said treaty obligation by the United States in the amount of $80,981.45 (items appearing in its Req. Find. No. 7) and that there is a balance due under said treaty obligation of $24,708.55. (Plff. in its reply brief claims a credit of $4,696.00 was erroneously given defendant and that the balance due is $29,404.55. Reply Brief pp. 32, 33)

There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there any evi-

dence of any demand having been made by petitioner for services or equipment not supplied.

8. Article VI of the Treaty of August 7, 1856 between the United States and the Creek Nation (11 Stat. 699) provided in part as follows:

> "In consideration of the foregoing quit-claim, re- [fol. 333] linquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * * *"

Plaintiff claims an obligation of defendant under the above provision to pay $10,000 as interest to the plaintiff for the years 1857 to 1861, both inclusive—a total of $50,000 upon which obligation the plaintiff contends the defendant still owes $29,000. (Pet. Req. Finding No. 8).

In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States. (Dft's Ex. 159, page 297)

The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166-170, 173).

The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).

9. The treaty of defendant with the Creek and Seminole Tribes of Indians of August 7, 1856 (11 Stat. 699) pro-

vided in Article V thereof that all claims and demands whatsoever which the Creek Nation might have against the United States, excepting only those continued as set out in said article, should be released and fully discharged. [fol. 334] Many of the claims asserted by the plaintiff herein are not among those specifically mentioned in said treaty provisions as being continued as liabilities of the defendant.

10. There is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged.

Edgar E. Witt, Chief Commissioner, Louis J. O'Mara, Associate Commissioner, Wm. M. Holt, Associate Commissioner.

[fol. 335] [File endorsement omitted]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant.

Appearances:

Mr. Paul M. Niebell, Attorney for Plaintiff.

Mr. Keith Browne, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION—February 18, 1959

Witt, Chief Commissioner, delivered the opinion of the Commission.

The plaintiff in its original petition asserts that it was the owner of trust and other funds, which said trust and other funds were held in trust by the defendant and paid and administered for the use and benefit of plaintiff, and that it was provided by the treaties between plaintiff and defendant that said trust and other funds were to be managed and invested and otherwise disposed of by defendant for the benefit of plaintiff, said treaties being specifically referred to in later allegations of said petition.

However, in the several claims thereafter in the petition specifically set out, no one of said claims in the opinion of this Commission, is shown to involve trust funds. [fol. 336] The first claim is for $87,309.75 and is described in detail in Sec. IV of plaintiff's petition and in Requested Finding No. 4 of plaintiff's requested findings of fact. Both descriptions of said claim state that same arose under Article II of the Treaty of June 16, 1802 (7 Stat. 68). In the petition it is alleged that defendant's total *obligation* under said treaty amounted to $320,000.00 and that defendant disbursed $232,690.25 only on said treaty obligation and therefore the amount of $87,309.75 is *due and owing* to plaintiff from defendant for defendant's *failure to fulfill said treaty obligation.* In the Requested Finding No. 4 plaintiff requests a finding that the total *obligations* of the United States under said Article II of said treaty amount to $317,000.00 on which the United States had only disbursed and accounted to the plaintiff for $254,690.25 and that defendant is *now due and owing to the Creek Nation a balance* of $62,309.75, for which the defendant has failed to account.

Both descriptions of said claim are for indebtedness claimed to have been created on the part of the defendant to the plaintiff by the provisions of the Treaty of June 16, 1802, and not for moneys it had received from or for the plaintiff, the management of which the defendant became trustee.

The next claim for which suit is brought is set out in Sec. V of plaintiff's petition. This claim is based on the provisions of Article III of the Treaty of November 14, 1805 between the Creek Nation and the United States (7

Stat. 96). The plaintiff alleges that said Article III created a total *obligation* on the part of the United States to de- [fol. 337] fendant in the amount of $196,000.00 on which the defendant disbursed $169,452.25 only on said treaty *obligation*, and therefore the amount of $26,547.75 *is due and owing to plaintiff for defendant's failure to fulfill said treaty obligation.*

This claim is again described in plaintiff's Requested Finding No. 5 in which it is stated that the total obligation under said treaty was $206,000.00 and total disbursements shown by General Accounting Office to be only $169,452.75, although Congress has appropriated the full amount due. And the balance now due and owing by the defendant on said treaty obligation is in the amount of $36,547.75.

The next claim is described in Sec. VI of plaintiff's petition as arising under provisions of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366) which total obligation under said treaty is alleged to be $60,000.00 on which it is alleged the defendant disbursed $49,938.99 only on said treaty obligation and therefore the amount of $10,061.01 *is now due and owing.* This claim is again described in plaintiff's Finding No. 6 wherein the *total obligation* under said treaty is stated to be $60,000.00, the total disbursement of the defendant on said obligation as having been only $49,938.99, leaving a balance *now due and owing from the United States to the Creek Nation* in the amount of $10,061.01.

The next claim for which suit is brought is described in Sec. VII of plaintiff's petition as arising out of treaty between the United States and the Creek Nation on February 14, 1833 (7 Stat. 417). It is alleged that the total *obligation* of the United States to the plaintiff under the provisions of said treaty was $119,240.00, on which the [fol. 338] defendant disbursed only $74,290.45, and the defendant *is now due and owing* to the plaintiff $44,949.55.

In petitioner's Finding No. 7 the total of said *obligation* under the above treaty is stated to have been $105,690.00, on which the defendant paid and disbursed to the Creek Nation in fulfillment thereof only the amount of $80,981.45

and that there is a balance now *due and owing* by the defendant to the plaintiff under said treaty obligation the amount of $24,708.45.

In plaintiff's reply brief (pp. 32, 33), it is alleged that an error had been made in giving the defendant credit for $4,696.00 to which it was not entitled and that the total disbursement to which the defendant was entitled to credit was only $76,285.45 and that plaintiff's claim on said item is the amount of $29,404.55.

In Sec. VIII of the plaintiff's petition a provision of the Treaty of August 7, 1856 (11 Stat. 699) is alleged as creating an *obligation* on the part of defendant to *pay* annually an item of $10,000.00 as interest to plaintiff; that said interest became due and owing for the years 1857-61 inclusive in the total amount of $50,000.00 on which obligation the defendant disbursed only $21,000, although Congress appropriated the total of $50,000.00, and therefore the amount of $29,000.00 *is due and owing to plaintiff from defendant* because of defendant's *failure to fulfill said treaty obligation.*

This liability is also described in plaintiff's Requested Finding No. 8 in practically the same language as described in the original petition.

[fol. 339] The final prayer of the plaintiff in its original petition reads as follows:

> "WHEREFORE, plaintiff prays:
>
> 1. That plaintiff be awarded judgment against defendant for the total amounts of said unfulfilled treaty obligations, together with interest at five per centum per annum on said amounts to date."

In plaintiff's last Requested Finding No. 9 in recapitulation the plaintiff asks for this finding:

> "Therefore, there is due and owing to the Creek Nation from the United States the following unpaid balance under the above treaty obligations of the United States."

Then follows an itemized statement of the several amounts previously asked for as due and owing aggregating with

the added amounts stated in the reply brief in the total amount of $167,323.06.

In plaintiff's Request for Findings of Fact No. 2 the treaty between the Creek Nation and the United States of August 7, 1790 (7 Stat. 35) is quoted the provisions whereby the Creek Nation acknowledges itself to be under the protection of the United States and no other sovereign, etc. and it is requested that this treaty provision be found to have created thereafter a fiduciary relationship between the Creek Nation and the United States as that of guardian and Indian ward. Thereafter in plaintiff's brief (p. 11) in support of the above requested finding, the plaintiff alleges that the claim (meaning all of the claims in the present suit) is for an accounting brought against the United States, "*its guardian.*"

Statement is then made (Brief, p. 2) that the claims presented are "claims under treaty provisions as the General Accounting Report clearly shows were not fulfilled by the United States, and as to which balances are shown [fol.340] therein *to be due and owing from the United States to the Creek Nation.*" Both parties make many and varying contentions as to the items of charge and credit involved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor.

As supporting its contention that the relationship is that of guardian and ward, the plaintiff relies on the language of the Treaty of 1790 which is quoted in findings of fact and also in the decisions of the Supreme Court in the Seminole case (316 U.S. 286, 295-297) and that of the *Sioux Tribe* v. *United States* (105 C. Cls. 725-802). The lan-

guage of the Supreme Court case, upon which the plaintiff relies, is language in keeping with that of many other decisions of the Supreme Court and other courts to the effect that there is a duty upon the Government in its dealings with the Indian Tribes of a more exacting nature than with two entities that might be called on a par with each other; but there is nothing in the decision that indicates a change in the burden of proof in such matters as [fol. 341] are involved in the present law suit. The decision of the Supreme Court cited was rendered on *May 11, 1942*. Some of the funds involved in that case grew out of treaties and obligations of debt created thereby. Others were trust funds.

The language quoted by the plaintiff from that decision was with regard to a claim based on alleged liability for a trust fund, provided by Article VIII of a Treaty of 1856 (11 Stat. 699), which fund was to be invested and managed for the plaintiff by the Government. At a later date (Nov. 5, 1945) the Supreme Court held by refusing Writ of Certiorari that a mere indebtedness of the Government to an Indian Tribe was not a trust fund.

We refer to the case of the Chickasaw Indians against the United States (in which, by the way, Mr. Paul M. Niebell, who is counsel in this case, was counsel therein) reported in 103 C. Cls. 1-57, as to which the Supreme Court on November 5, 1945 denied certiorari as to the judgment on the merits. This case involves, among other claims, plain and simple treaty obligations of the United States to the plaintiff Indians, as to which the plaintiff claimed nonpayment and non-fulfillment. As in the case at bar the evidence upon which the plaintiff relied for the nonfulfillment of the obligations, and its right to recover therefor, *was a failure of the defendant to prove compliance and fulfillment*. In many instances there was a showing of merchandise due and owing by the defendant to the plaintiff, and by the defendant, merely a memorandum of purchase for the plaintiff, *but no showing of actual delivery* [fol. 342] *to the plaintiff. There being no proof on the part of the plaintiff that it did not get the goods and value.* The plaintiff therein contended, as in the case at bar, that

the burden was on the defendant to prove delivery to plaintiff, or payment to plaintiff. A statement of the Court as to same is applicable to many of the situations in the case at bar; "for the years 1798, 1799, and 1800 goods of the annuity values were forwarded from the War Department Storehouse in Philadelphia for the Chickasaw Nation. It must be presumed *that they were received in due course.* (italics suplied) To require defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. *The burden is upon the plaintiff to prove its case.* While the jurisdictional act waives the lapse of time, it does not thereby shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff."

Other claims in the Chickasaw case were for deposits of Chickasaw money to other tribes. The Court says: "there is lack of proof that the deposits were erroneously made. The mere fact of deposit to other than a Chickasaw fund, without more, does not entitle plaintiff to recover * * * " "No judgment of recovery can be based on the showing made." (p. 42)

There were some items of claim allowed in the Chickasaw case, items in which the barden of proof was not involved. Offsets were allowed, however, which wiped out the entire amount of the award. Petition for Certiorari was [fol. 343] filed with the Supreme Court on the whole case. It was allowed only as to the offsets. We find, upon examining the petition for certiorari that it was stated that the basic question presented was "whether the regular equitable principles governing an accounting between the guardian and ward are to be applied to a case in which the Chickasaw Nation demands an accounting from the United States of moneys due it under treaties and agreements." Also, "whether the Indian ward has the burden of proving the items it excepts to in the guardian's account." The refusal of the Supreme Court to allow certiorari on the matters hereinabove specifically called to its attention is evidence that it approved the holdings of the Court of

Claims in reference to such matters; and this, of course, leaves the law as applied to the "burden of proof" where it was found by the Court of Claims to be—that was on the plaintiff. This is therefore the law as to the burden of proof applicable to the claims in the instant case.

As the plaintiff, in support of its viewpoint as to the burden of proof also cites the case of *Sioux* v. *United States* (105 C. Cls. 725) wherein the court states that "The defendant is the trustee; it kept and has all the records and evidence and it has the burden of making the proper accounting," (p. 802), attention will be called to the fact that in that case the matter involved was the proceeds in the possession of defendant of land sold by the defendant, which money, of course, was a trust fund and the handling of same is governed by the rules applying to trustee and guardian. Such is not the situation in the present case, [fol. 344] but only involves the relationship of relationship of ordinary debtor and creditor.

The plaintiff relies solely on the language of the Treaty of 1790 (under which no claim asserted is based) as the basis for its claim that the relationship of guardian and ward existed between it and the defendant. One of the latest pronouncements with reference to the relationship between the Indian tribes and the United States is that of *Gila River Pima-Maricopa Indian Community* v. *United States* (Ct. Cls., 140 F. Supp. 766, 780).

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive Order, or statute under which the claim presented arises. It is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Gov-

> ernment is "similar to" or "resembles" such a legal relationship and that the doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. (Citing *Creek Nation* v. *United States*, 318 U.S. 629, 642)

We also call attention to a discussion of the Court of Claims as to the relationship of guardian and ward as between Indian Tribes and the Government appearing in the decision of that Court in the case of *Sioux Tribe* vs. *United States*, 146 F. Supp. 299 (1956); also discussion of this question by this Commission in its opinion in the *Omaha Tribe, et al.* vs. *United States*, 6 Ind. Cls. Com. 68, 73, 74.

[fol. 345] The plaintiff makes mention in its reply brief of the Chickasaw case (103 C. Cls. 1) and insists that the decision therein has no application to the present case, and in any event the holding of the Court of Claims in the *Sioux* case, 105 C. Cls. 725, overrules the holdings in the *Chickasaw* case. The decision in the Sioux case, if it were different from that in the Chickasaw case, could not overrule the same because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari. However, the holding in the Sioux case is not on facts of the kind involved in the Chickasaw case, because claim in the Sioux case was based on the handling of funds received by the United States as the proceeds of the sale by it of lands belonging to the Sioux Tribe whereby said funds became trust funds and the principle of law applying to the handling of same by trustee or guardian applied.

The plaintiff makes the statement in its reply brief (p. 51) that if it "had filed suit under the Creek Treaties of 1790 and 1796, and under the Secret Article of the 1790 treaty, we would have had a somewhat similar case to that of the Chickasaws." We cannot follow such reasoning. The instant case seems to be on "all fours" with the claims we rely on in the Chickasaw case.

The *Menominee* case, reported at 102 C. Cls. 555, involved proceeds of sale of plaintiff's property, and that reported 118 C. Cls. 326 involved offsets asserted by it, and are not applicable to the case at bar.

[fol. 346] As to the monetary liability, if any, created by the obligation of the Government to furnish black-smith, wheelwright and equipment, as to which specific money obligations are not specified, the defendant contends that such obligations do not create a fixed monetary liability; and that to recover for a failure on the part of the defendant to comply with the treaty stipulations would require proof on the part of the plaintiff as to the pecuniary losses suffered by reason of the alleged failure. As to whether or not this contention is correct, or as to whether the basis for the sums claimed by the plaintiff as money liability for the alleged failure on the part of the defendant is correct, it is not necessary for us to determine under our holding that plaintiff has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had.

Defendant contends that the claims are res judicata by reason of jurisdictional acts and cases cited. The defendant also claims that by provisions of the Treaty of August 7, 1856 plaintiff released many of the claims urged in this case. This Commission is inclined to the opinion that the defense of res judicata is not well taken but with reference to the effect of the release provisions of the Treaty of 1856, it is inclined to agree with defendant; however, in view of its decisions on the merits, it is not necessary for it to decide as to the plea of res judicata or as to the effect of release provisions of the Treaty of 1856. As to said release, however, the plaintiff practically admits its effectiveness as to all claims based on the treaties of 1805 and 1832 when it [fol. 347] says in its reply brief (p. 56), "As a legal matter this release would bar the claims under the Treaties of 1805 and 1832 as defendant contends." Certainly the claims of this suit are based on treaties, not on moral obligations and are definitely and unquestionably legal claims and are being so urged and urged only as legal claims.

In keeping with this opinion and findings of fact filed herein, this case will be dismissed.

Edgar E. Witt, Chief Commissioner.

Concurring:

Louis J. O'Marr, Associate Commissioner, Wm. M. Holt, Associate Commissioner.

[fol. 348] [File endorsement omitted]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION, Plaintiff,

v.

THE UNITED STATES, Defendant.

FINAL ORDER—February 18, 1959

Based upon the findings of fact this day filed herein, which are hereby made a part of this order, and in keeping with the opinion this day released, as a matter of law, the Commission holds that the plaintiffs herein are not entitled to recover in this case.

It Is Therefore Ordered and Adjudged that the claims in this cause asserted be, and the same are, hereby dismissed.

Dated at Washington, D. C., this 18th day of February, 1959.

Edgar E. Witt, Chief Commissioner, Louis J. O'Marr, Associate Commissioner, Wm. M. Holt, Associate Commissioner.

[fol. 349] [File endorsement omitted]

BEFORE THE INDIAN CLAIMS COMMISSION

[Title omitted]

NOTICE OF APPEAL—Filed May 13, 1959

The Creek Nation, plaintiff, files this Notice of Appeal to the United States Court of Claims from the final judgment of the Indian Claims Commission, entered herein on February 18, 1959, dismissing plaintiff's petition.

In support of said appeal plaintiff states that the Indian Claims Commission erred in its findings of fact and conclusions of law, in the following respects:

1. In finding and holding that the several claims herein presented were in the nature of an action of debt under Clause 1, Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049 (Finding 2, 7 I.C.C. 117).

2. In failing to find and hold that the claims herein presented would invoke the relief provided in Clauses 1, 2, 3 and 5 of said Indian Claims Commission Act.

3. In failing to find and hold that the claims herein presented arise out of an accounting made by the United States to its dependent Indian ward, the Creek Nation, of all moneys disbursed by it in fulfillment of its treaty obligations to the Creek Nation.

4. In failing to find and hold that the disclosures made in an accounting made by defendant's own General Accounting Office, showing that the United States failed to disburse the full amounts required to be disbursed by United States in fulfillment of its treaty obligations to the Creek Nation, were admissions against interest, and constituted adequate proof of such failure; and was evidence which plaintiff could rely upon in support of the claims herein presented.

5. In failing to find and hold that when Congress annually appropriated moneys to fulfill the treaty obligations of the United States to an Indian tribe, in this case the

Creek Nation, due said Indian ward as the proceeds of the sale of its lands to the United States, and the administrative officers of the United States set up said moneys on the books of the United States Treasury as "Fulfilling Treaties with Creeks", or similar headings, said funds became trust funds for which the United States has the duty to account, and the duty and burden of proof, as trustee, of showing that such funds were properly disbursed for the benefit of plaintiff tribe in accordance with said treaty obligations of the United States.

6. In failing to find and hold that the United States in fulfilling its treaty obligations to an Indian tribe is more than a mere contracting party, and that its conduct in the performance of its said treaty obligations is to be judged by the most exacting fiduciary standards.

[fol. 350] 7. In finding and holding that the relation of guardian and ward, between the Creek Nation of Indians and the United States has not been established and well settled by the Courts.

8. In failing to find and hold that the fiduciary relationship between the Creek Nation and the United States had been established under the provisions of Article II of the Treaty of August 7, 1790 (7 Stat. 35, 2 Kapp. 25), between the Creek Nation and the United States, under which the Creek Nation agreed to be "under the protection of the United States of America, and of no other sovereign whosoever", and that said status continued over the period of the claims herein presented.

9. In failing to find as a part of its Finding 4 (7 I.C.C. 120) that the defendant admitted in its general accounting report that the goods purchased in Philadelphia, Pennsylvania, and forwarded "for" (and not "to") Creek Indians, were actually forwarded to United States factors, purportedly in fulfillment of the obligations of the United States under its Treaties of August 7, 1790 (7 Stat. 35, 2 Kapp. 25), and the Treaty of June 29, 1796 (7 Stat. 56, 2 Kapp. 46), with the Creek Nation, which are not involved in this suit; that the plaintiff had the right to rely upon said admissions in support of its claims under the Creek

Treaties of June 16, 1802 (7 Stat. 68, 2 Kapp. 58), and November 14, 1805 (7 Stat. 96; 2 Kapp. 85); and that the defendant has the burden of then proving that any of said goods were ever delivered to the Creek Nation in fulfillment of the obligations of the United States under the provisions of said Treaties of 1802 and 1805, which are in issue in this case.

10. In failing to find in said Finding 4 whether or not the total obligation of the defendant to the Creek Nation under Article II of the Treaty of June 6, 1802 had been fulfilled.

11. In the failing to find in Finding 5 (7 I.C.C. 121) whether or not the total obligation of the United States under Article III of the Creek Treaty of November 14, 1805 (7 Stat. 96; 2 Kapp. 85) had been fulfilled.

Also in stating in said Finding 5 that—

> "The unallocated disbursements by defendant, as stated in the preceding finding, in the total amount of $99,461.45 is in excess of the amounts claimed by the plaintiff as being due and unpaid under the obligations of both the Treaties of 1802 and 1805."

without further finding what portion of said goods were presumably forwarded to United States factors in fulfillment of the Creek Treaties of August 7, 1790 and June 29, 1796 (Cl. Ex. 15, pp. 102-103), which are not involved in this case; and what portion, if any, were chargeable to the obligations of defendant under said Treaties of 1802 and 1805.

12. In including in Finding 6 (7 I.C.C. 122-123) facts relating to the obligations of the United States under Article 4 of the Creek Treaty of January 4, 1845, or the Creek Treaty of August 7, 1856, which were not involved in this claim, and were not in issue.

And in failing to find in said Finding 6 whether or not the defendant had fulfilled all of its obligations to plaintiff under Article XIII of the Creek Treaty of March 24, 1832 (7 Stat. 366; 2 Kapp. 341), which was the sole issue presented in this claim.

13. In failing to find in Finding 7 (7 I.C.C. 123-124) whether or not the total obligation of the United States to the Creek Nation under Article V of the Creek Treaty of [fol. 351] February 14, 1833 (7 Stat. 417, 2 Kapp. 388), had been fulfilled.

In finding as a part of said Finding 7 the following:

> "There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there any evidence of any demand having been made by petitioner for services or equipment not supplied."

as being wholly immaterial, and not supported by any substantial evidence in the record.

And in failing to find and hold that Congress definitely fixed the amount to be disbursed by the United States for the services of blacksmiths and blacksmith supplies under said Article V of the Creek Treaty of February 14, 1833, by annually appropriating the amount of $1,710.00 over a long period of years, and further acknowledged said obligation in this amount in Article V of the Creek Treaty of August 7, 1856 (11 Stat. 699; 2 Kapp. 756).

14. In failing to find in its Finding 8 (7 I.C.C. 124-125), what the total obligation of the United States was to the Creek Nation under Article VI of the Creek Treaty of August 7, 1856, and whether or not said obligation had been fulfilled by defendant within the period covered by the fiscal years 1857 through 1861, before the Civil War began.

In finding as a part of said Finding 8 the following:

> "In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States (Dft's Ex. 159, p. 297).
>
> "The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166-170, 173).

> "The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790)."

as being wholly immaterial to the issues in said claim under said Treaty of 1856, or as not being supported by the substantial evidence in the record.

In failing to find and hold in said Finding 8 that under the rules of fair and honorable dealing under the provisions of Clause 5, Section 2 of the Indian Claims Commission Act, plaintiff is entitled to recover any amounts due and owing to plaintiff from defendant under said Article VI of the Creek Treaty of August 7, 1856, before the beginning of the Civil War period (fiscal years 1862-1866).

15. In failing to find and hold in Finding 9 (7 I.C.C. 125-126) that the claims presented herein under said Creek Treaties of 1802 and 1833 were specifically excepted from the general release in Article V of the Creek Treaty of August 7, 1856 (11 Stat. 699, 2 Kapp. 756), and in failing to find and hold that as a matter of equity and fair and honorable dealing said general release was not supported by any consideration for the release of said claims under said Creek Treaties of 1805 and 1832, and therefore would be no bar to recovery thereon, under the provisions of Clauses 3 and 5, Section 2 of said Indian Claims Commission Act.

[fol. 352] 16. In finding in Finding 10 (7 I.C.C. 126) that—

> "There is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged."

as not being supported by any substantial evidence in the record.

17. In holding as a matter of law that "no one of said claims in the opinion of this Commission, is shown to involve trust funds." (7 I.C.C. 127).

18. In holding as a matter of law that plaintiff would have to allege that the amounts of the unfulfilled treaty obligations of the United States, and claimed herein, were "moneys it had received from or for the plaintiff, the management of which the defendant became trustee," in order to recover (7 I.C.C. 117).

19. In failing to hold that the allegations of the petition are sufficient to support the claims therein presented.

20. In overlooking the prayer for general relief, requesting the Commission to grant plaintiff any and all relief said Commission has jurisdiction to give plaintiff under the provisions of said Indian Claims Commission Act.

21. In holding as a matter of law that the plaintiff had not sustained the burden of proof in this case, when plaintiff, relying upon the admissions of defendant as set forth in defendant's own accounting report, showed that the United States had failed to fulfill its said treaty obligations to plaintiff under the treaty provisions set forth specifically in plaintiff's petition; and in failing to hold that after plaintiff had given defendant credit for all payments shown by defendant's own accounting report as having been made against said treaty obligations, the burden shifts to defendant to prove any further credits due it as payments on said claims, and that defendant is liable to plaintiff for its failure to do so.

22. In holding that the defendant does not have the burden of proof of any credits claimed by it as payments on the claims involved herein under the provisions of Section 2 of said Indian Claims Commission Act.

23. In holding that plaintiff has the burden of proving that it did not receive the amounts which the defendant's own accounting report admits were not paid by defendant on its treaty obligations to plaintiff.

24. In failing to apply to this case the principle laid down by the Court of Claims in Sioux Tribe v. United States, 105 C. Cls. 725, 802, that "The defendant is the

trustee; it kept and has all the records and evidence and it has the burden of making the proper accounting."

25. In applying the rule in Chickasaw Nation v. United States, 103 C. Cls. 1, which was later overruled on the question of the burden of proof in the Sioux Case, supra, and in Seminole Nation v. United States, 316 U. S. 286, 296, 297, in which the Supreme Court held that in carrying out its treaty obligations with the Indian tribes the Government is more than a mere contracting party, and that its conduct should be judged by the most exacting fiduciary standards.

26. In holding that a denial of a writ of certiorari by the United States Supreme Court is an affirmance of the lower court's decision, and in failing to hold that the de- [fol. 353] nial of a writ of certiorari does not mean that a case is without merit, but merely that the Court is unwilling to take the case in comparison with other more important litigation demanding its attention.

27. In holding that the Menominee Tribe v. United States, 118 C. Cls. 290, 326, in not applicable to this case, in that said case settled the principle that defendant has the burden of proving the credits it claims as payments on the claim, offsets and counterclaims under Section 2 of the Indian Claims Commission Act.

28. In failing to hold that the United States has the burden of keeping proper records of its disbursements under its said treaty obligations with plaintiff, and that all presumptions and doubts arising from said accounting are resolved against it; and that the United States has the burden of proving any credits due it arising out of such doubts, when the accounting is questioned by an Indian ward.

29. In failing to hold that the guardian and ward relationship between the Creek Nation and the United States has long been settled, in its application of the Gila River Pima-Maricopa Indian Community v. United States, 135 C. Cls. 180, 189 to the issues herein involved.

30. In failing to hold that the United States is liable to plaintiff upon the facts disclosed by the record in this case, and in dismissing the petition in this case.

An additional copy of this notice of appeal is filed with the Clerk for service upon the defendant in accordance with Rule 58 of the Court of Claims.

It is requested that the Clerk of the Commission prepare the record in this case for the purposes of this appeal, and transmit it to the Court of Claims for docketing this appeal in that Court.

Respectfully submitted,

The Creek Nation, Plaintiff, By Paul M. Niebell, Its Attorney of Record.

[fol. 354] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 355] FILING OF RECORD ON APPEAL

On May 18, 1959, the record on appeal from the Indian Claims Commission was filed.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 4, 1960 (omitted in printing)

[fol. 356]

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 3-59

THE CREEK NATION,

—v.—

THE UNITED STATES.

Paul M. Niebell for appellant.

Keith Browne, with whom was Assistant Attorney General Perry W. Morton, for appellee.

OPINION—March 1, 1961

PER CURIAM: This suit was filed with the Indian Claims Commission (Docket No. 292) to recover sums alleged to be due the Indians under certain treaties entered into between the Creek Nation and the United States. The Commission entered findings of fact and an opinion pursuant to which a judgment of dismissal was entered. The Creek Nation appeals here from that decision.

Upon consideration of the record below, as well as the briefs and argument of counsel in this court, and the court being in agreement with the disposition of the case made by the Indian Claims Commission, its judgment of dismissal is affirmed.

It is so ordered.

LITTLETON, Judge (Ret.), with whom MADDEN, Judge, concurs, dissenting:

This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Com-

mission. While the instant suit was not brought strictly as [fol. 357] a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. In the *Iowa Tribe of the Iowa Reservations in Kansas and Nebraska, et cetera* case, Docket No. 70, decided June 19, 1952, 2 Ind. Cl. Comm. 167, 176, the Commission stated that:

> In its dealings with the Tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations.

The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal

by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked [fol. 358] the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. It provides:

> On said appeal the Court *shall* determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. * * * [Emphasis supplied.] 25 U.S.C. § 70s(b).

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail.

This is an appeal from a decision of the Indian Claims Commission. Appellant, the Creek Nation, brought an action under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. §§ 70-70v, to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.[1] Appel-

[1] The treaties involved are those of June 16, 1802, 7 Stat. 68; November 14, 1805, 7 Stat. 96; March 24, 1832, 7 Stat. 366; February 14, 1833, 7 Stat. 417; and August 7, 1856, 11 Stat. 699.

lant alleged that the full amounts which the United States was obligated to pay to appellant under these treaties were not in fact paid, and appellant claimed the right to recover the unpaid balances. The United States denied that any sums were due, owing or unpaid under the treaties in question. It also presented defenses of res judicata and release.[2] [fol. 359] This case involves the question of whether appellant made a sufficient showing that the Government did not fulfill its treaty obligations.

Appellant introduced in evidence before the Indian Claims Commission the records of treaty payments to appellant which were maintained by the Government and are now in the custody of the General Accounting Office. These records do not specifically show that the entire amounts due under the various treaties in issue were paid to appellant.

The amounts claimed by appellant are $62,309.75 under the Treaty of 1802, $36,547.75 under the Treaty of 1805, $10,061.01 under the Treaty of 1832, $29,404.55 under the Treaty of 1833, and $29,000 under the Treaty of 1856. The total claimed is $167,323.06.

I think that appellant established its claim to $26,396.05 of that amount. Another $29,000 appears to be due appellant, but the Government should have the opportunity upon remand to the Commission to show that the amount was paid. As to an additional $39,465.56, the Commission did not make certain essential findings of fact, and that portion of the case should have been remanded for such findings.

The basic issue in this case can be understood by a preliminary look at the problems arising in connection with the Treaties of 1802 and 1805.

With respect to the 1802 Treaty, 7 Stat. 68, the parties agree that the total obligation under Article II was $317,000. The General Accounting Office report shows the amount specifically allocated to payment of obligations under the

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[2] Because of its resolution of this case on the ground that appellant had not proved its case, the Indian Claims Commission did not deal with the issues of res judicata and the effect of the release given by appellant in 1856. These issues will not, therefore, be dealt with in this dissenting opinion.

1802 Treaty to be $254,690.25. The parties also agree that the total obligation under Article III of the 1805 Treaty, 7 Stat. 96, was $206,000. The G.A.O. report shows $169,452.25 as disbursements made in connection with the 1805 Treaty. Appellant claims, therefore, that there is an unpaid balance of $62,309.75 due under the 1802 Treaty, and of $36,547.75 under the 1805 Treaty, making a total under the two treaties of $98,857.50, and it complains of the Commission's failure to so find.

The G.A.O. report also shows that, during the years 1803 through 1809, a total of $77,263.45, in money and goods, was [fol. 360] paid and forwarded to the Creek Indians.[3] For the years 1811, 1815, 1817 and 1818, payments totaling $22,198 are shown to have been made to the Creeks. No part of this total amount of $99,461.45 was allocated by the G.A.O. report to any particular treaty.

Appellee's contention is that, because appellant did not show that any of this $99,461.45 was *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government is entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeds the $98,857.50 claimed by appellant to be due, so appellee's theory would defeat recovery under these two treaties. The Indian Claims Commission adopted the Government's position and determined that nothing was due to appellant. 7 Ind. Cl. Comm. 117.

Appellant argues that the relationship between the United States and an Indian tribe is such that the Government has the burden of presenting an accurate accounting of its payments to appellant pursuant to the treaties in question.

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[3] Appellant's contention that the fact that the section of the G.A.O. report which lists these disbursements is labeled "* * * information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians *pursuant to the Treaty of August 7, 1790, 7 Stat. 35*" (emphasis supplied) shows that the disbursements had no relation to the 1802 or 1805 Treaties is negatived by the statements in the body of the section that the payments could not be definitely attributed to any particular treaty, and also by the separate listing within the section of other disbursements which could be allocated definitely to the 1790 Treaty.

Appellant maintains, therefore, that the Government is not entitled to credit for any amounts not specifically allocated on its books to fulfillment of these treaties.

I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties.

I also think, however, that appellant here has attempted to draw a more ambitious conclusion than is warranted from the fact of its relationship with the Government. While the Government had the duty to clearly account for its per- [fol. 361] formance of its treaty obligations, I think that it has done so when it has shown payments to the Creek Nation which, although not specifically labeled as payments pursuant to the treaties in question, are sufficiently identified in the Government's records to show that they could have been nothing other than payments pursuant to those treaties. For example, if payments labeled "annuities for the Creeks under Creek treaties" are listed in the Government's records for years in which no treaty other than the treaty in question was in force, the conclusion is warranted that the payments were made under the treaty in question.

The Relationship Between the Parties

The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to "be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> [The Indians] are in a state of pupilage. Their relation to the United States *resembles that of a ward to his guardian.*

With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in *Creek Nation* v. *United States*, 295 U.S. 103, 109-110:

> * * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
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> * * * It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

The Indian Claims Commission itself has recognized that a "fiduciary relationship" exists between the Creek Nation and the United States. *The Creek Nation* v. *United States*, 2 Ind. Cl. Comm. 66, 114.

[fol. 362] The Supreme Court further defined and established the nature of the relationship between the Government and the Indian tribes as similar to that of guardian and ward in *United States* v. *Kagama*, 118 U.S. 375, where the Court said, "These Indian tribes *are* the wards of the Nation." 118 U.S. at 383.

Appellee places great reliance upon an 1886 decision of this court, *Choctaw Nation* v. *United States*, 21 Ct. Cl. 59, where it was said that the cases "fall far short of holding that the rules of law as applicable to controversies between guardian and ward are to prevail in suits between the United States and the Indian tribes." 21 Ct. Cl. at 92-93. Appellee has overlooked the fact that the decision was reversed by the Supreme Court, in *Choctaw Nation* v. *United States*, 119 U.S. 1, and that the Supreme Court said:

> As was said by this court recently in the case of the *United States* v. *Kagama*, 118 U.S. 375, 383: "These Indian Tribes *are* the wards of the Nation; they are communities *dependent* on the United States; * * * *"*
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> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care

and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. 119 U.S. at 27-28.

The Court repeated, in *United States* v. *Payne*, 264 U.S. 446, that, with regard to the Indians,

> * * * the United States occupies the position and assumes the responsibilities of virtual guardianship. * * *. 264 U.S. at 448.

[fol. 363] Of particular importance is the Supreme Court's ruling in *Seminole Nation* v. *United States*, 316 U.S. 286, which involved the question of the handling of annuity payments to Indians. It is true that the treaty had set up a "trust fund" out of the interest from which the annuities were to be paid. But the Supreme Court did not base its conclusion upon the "trust nature" of the particular fund involved. The Court stated:

> * * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its

> conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. 316 U.S. at 296-297.

The Court made clear that the Government's fiduciary responsibilities derive from the *status* of the "dependent and sometimes exploited" Indians, and that the Government bears these responsibilities "*in its dealings*" with the Indians, not, as defendant would have it, merely in connection with those particular dealings which, when occurring between two equal parties, would give rise to fiduciary duties.

The Indian Claims Commission relied heavily, in its decision of this case, upon *Chickasaw Nation* v. *United States*, 103 Ct. Cl. 1, certiorari granted, limited to question of specific designation of offsets, and judgment reversed, 326 U.S. 217. That case does support appellee's position, but does not have the weight attributed to it by the Indian Claims Commission as a result of the Commission's misconception of the meaning of the Supreme Court's denial of certiorari as to the issues relevant to this case.

In *Chickasaw* the Government's records showed that it had purchased annuity goods for various tribes, but did not show how much of these goods had been allocated to the Chickasaws as distinguished from the other tribes. This [fol. 364] court said, "Unless this allocation is known, the shortage, if any, in the goods annuity of $3,000 cannot be ascertained. The accounts show no shortage for which judgment may be given." 103 Ct. Cl. at 35-36. It should be noted, however, that the problem did not receive extended consideration by this court in *Chickasaw*. The Indian Claims Commission, however, in relying upon *Chickasaw* rather than upon more recent decisions of this court which support the conclusion which I would reach, stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in *Chickasaw*] is evidence that it approved the holdings of the Court of Claims in reference to such matters." 7 Ind. Cl. Comm. at 135. The Commission went on to say that the

decision of this court in *Sioux Tribe of Indians* v. *United States*, 105 Ct. Cl. 725, *infra*, "could not overrule the [*Chickasaw* case] because the *Sioux* case is a Court of Claims opinion only, while the holdings in the *Chickasaw* case were approved by the Supreme Court by its refusal to grant a writ of certiorari." 7 Ind. Cl. Comm. at 137.

The Supreme Court has made clear that no such inference is to be drawn from its denial of certiorari in any case.[1]

The Government strenuously urges that the fact that appellant and the Government stand in a creditor-debtor relation precludes the conclusion that it owes appellant the duties of a trustee. The Government's contention is expressly negatived by the language of this court in *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 20, where the court stated that the Government is "a debtor who stands [fol. 365] in the position of a trustee or fiduciary toward his creditor," when the creditor is an Indian tribe. The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, said that the amounts there in question, a "Treaty Fund" of annual appropriations for payment of treaty stipulations, i.e., for payment of a *debt* to the Indians, had "exactly the same characteristics" as a "Trust Fund" applied to the education of the Indians. The Court said, "They are moneys

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[1] *United States* v. *Shubert*, 348 U.S. 222, 228-229; *Sunal* v. *Large*, 332 U.S. 174, 181; *House* v. *Mayo*, 324 U.S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U.S. 401, 403-404; *United States* v. *Carver*, 260 U.S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U.S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in *Darr* v. *Burford*, 339 U.S. 200, 226-228, where he stated at page 226:

> "The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.
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> "Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner."

belonging really to the Indians." 210 U.S. at 81.[5] That case clearly shows that the treatment of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, "In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party."

This court has recognized that it is "settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19. In that case, the Government was merely a debtor, yet the court held that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee." 101 Ct. Cl. at 19. The duty there imposed on the Government was that of seeing to it that the Indians' property—claims against the Government—was productive of an income. This is certainly more than the duty of an ordinary debtor, and no less rigorous than the duty of keeping a clear account of the Indians' claims. The court characterized the Government's position as that of "debtor-with-the-duties-of-a-trustee". 101 Ct. Cl. at 19 (and has recently characterized the Indians as "*quasi wards*", *Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359, 362).[6]

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[5] The Government, in its brief in this case, acknowledges that the "treaty stipulations made the basis of claim herein, and the allegations of the petition respecting them fall into" the category which the Supreme Court in *Quick Bear* v. *Leupp* described as "the Indians' money".

[6] This court's language in *Gila River Pima-Maricopa Indians* v. *United States*, 135 Ct. Cl. 180, 189, relied on by the Government, is not to the contrary. All that was said in that case was that the *precise*, *formal* guardian-ward relationship between the United States and an Indian tribe is created by treaty or other specific provision, while in the absence of such express provision, the relationship is one which is similar to or resembles the technical guardian-ward relationship, as was held in *Creek Nation* v. *United States*, 318 U.S. 629, 642; *Seminole Nation* v. *United States*, 316 U.S. 286; and *Menominee Tribe of Indians* v. *United States*, 102 Ct. Cl. 555.

This court's opinion in the recent case of *United States* v. *The Seminole Nation*, Appeal No. 3-58, decided June 3, 1959, — Ct. Cl.

[fol. 366] I think that the above discussion indicates that the debt owed to an Indian tribe pursuant to a treaty must be "dealt with by the Government as if it belonged to [the Indians], as morally it does", *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, *supra*, and that the Government is bound by duties of trust in dealing with this money. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19, *supra*. The decision of this court in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 725,[1] is, therefore, directly applicable here.

> The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.

In the *Sioux* case, the Indians sought to recover certain amounts disbursed by the Government from trust funds

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—, 173 F. Supp. 784, 790, makes clear that all the *Gila River* case said was that while "preciseness" in the relationship is found in the particular treaty provision, the nature of the relationship between the United States and Indian tribes in general is that of "a fiduciary relationship". The court said (173 F. Supp. at 790):

> "Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian 'wards'."

I am also aware of what was said in *Kansas or Kaw Tribe of Indians* v. *United States*, 80 Ct. Cl. 264, 301-302, *cert. denied*, 296 U.S. 577, to the effect that a treaty provision similar to that of Article II of the 1790 Creek Treaty did not create a guardian-ward relationship. That case was decided on December 3, 1934, prior to the Supreme Court's decision in *Creek Nation* v. *United States*, *supra*, announced on April 29, 1935. I think that the *Creek* case vitiates any broad force of this language in the *Kansas* case, which can mean only that a *technical* guardian-ward relationship does not exist. See *United States* v. *Seminole Nation*, *supra*, 173 F. Supp. 784, 790. For the same reason the language in *Omaha Tribe of Nebraska* v. *United States*, 6 Ind. Cl. Comm. 68, 71-74, is of doubtful validity, and is based primarily on the *Kansas* case and a misinterpretation of the *Gila River* case.

[1] Certiorari granted, judgment vacated, and case remanded to Court of Claims for determination as to whether plaintiff-petitioner could assert any additional claims, 329 U.S. 685; supplemental petition dismissed, 112 Ct. Cl. 50; *cert. denied*, 337 U.S. 908.

which had arisen from the sale of land belonging to the Indians. The disbursements had been made by the Government for certain Indian agency and educational expenses. The Indians claimed that the disbursements were for obligations of the Government, so that they should not have been paid out of the Indians' funds. The Government maintained that the expenditures were proper charges [fol. 367] against the Indians' funds since they were expenditures for the benefit of the Indians, and argued that the Indians had the burden of showing what portion of the disbursements were for obligations of the Government. It said that in the voluminous accounting as to the claims presented it could not be expected to detail with exactness the purposes and amounts of the many disbursements, and that the burden rested on the Indians to prove such details. The court held, however, that the "primary duty to so classify and report as to the nature and the amount of disbursements rested on defendant." 105 Ct. Cl. at 802.

The court said:

> Since the Government obligated itself in the treaty and the agreements of 1868, 1877, and 1889 to provide agencies, aid and assistance, schools, and instruction, the burden is on defendant to show what portion, if any, of such expenses has not been assumed by it and should be charged to the Indians. *The Government cannot escape its primary obligations by including, among improper charges against the Indians, expenditures which it now says, without proof, may have been to some unknown and unascertainable extent proper charges against the Indians.* The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802. [Emphasis supplied.]

The Indian Claims Commission attempted to distinguish the *Sioux* case on the grounds that it involved a "trust fund" whose handling was "governed by the rules applying to trustee and guardian," while the present case "only involves the relationship of * * * ordinary debtor and creditor." 7 Ind. Cl. Comm. at 135-136. Since, as has been demon-

strated above, an Indian tribe and the Government are not "ordinary debtor and creditor", and the Government's handling of its debts to the Indians is in fact "governed by the rules applying to trustee and guardian", the *Sioux* case is very much in point here.

The relationship between the United States and appellant is not *precisely* that of guardian and ward, but their relationship is sufficiently similar thereto to impose upon the United States the duty of maintaining a clear and unambiguous account of its payments to appellant under its various treaty commitments.

[fol. 368]

The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical understanding of the problems involved in this particular aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account of the payments it makes pursuant to its obligations to the Indians.

Treaties of 1802 and 1805

As was pointed out in the introductory section of this opinion, appellant is claiming an unpaid balance of $98,857.50 under the Treaties of 1802 and 1805. The Government claims credit for $99,461.45, an amount which the Government's records do not specifically show to have been paid under these treaties. In the light of what I believe to be the nature of the relationship between the parties in this case, I think that the Government is entitled to credit for only that portion of the $99,461.45 which is sufficiently

identified in its records as having been paid under the 1802 and 1805 Treaties.[8]

[fol. 369] To show that some of the unallocated $99,461.45 could have been disbursed pursuant to treaties other than those of 1802 and 1805, appellant points to the Treaty of August 7, 1790, 7 Stat. 35, Article IV of which provided that the United States pay to the Creeks an annuity of $1,500. The United States also undertook to furnish domestic animals, farm implements, and interpreters to the Creeks. Appellant claims that the obligation to provide interpreters was worth $400 per year, and that the 1790 Treaty contained a secret article which obligated the United States to pay to Creek Chief Alexander McGillivray an annual stipend of $1,200, and to each of six other chiefs annual stipends of $100 for life. Appellant thus claims that the 1790 Treaty established a yearly obligation on the United States of $3,700. Appellee points out that there is no evidence of any secret article in the 1790 Treaty. Chief Alexander McGillivray died in 1793, so no part of his life

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[8] The G.A.O. report lists disbursements totaling $22,198 in a section which says that it contains information relative to disbursements made during the years 1811 to 1834. Appellant therefore points to some ten treaties other than those of 1802 and 1805 between the Creek Nation and the United States which were in force during that period (Treaties of 1790, 1796, 1814, 1818, 1821, 1825, 1826, 1827, 1832 and 1833), and argues that the $22,198 may have been disbursed pursuant to some one of these treaties. We note, however, that although the section contains payments made from 1811 to 1834, the $22,198 in question is listed as having been paid in 1811, 1815, 1817 and 1818. It cannot, therefore, have been paid pursuant to any of the six treaties concluded after 1818. The effect of the 1790 and 1796 Treaties is discussed in the body of the opinion. The Treaty of August 9, 1814, 7 Stat. 120, does not appear to provide for any payments such as those listed for 1815, 1817 or 1818. That leaves the Treaty of January 22, 1818, 7 Stat. 171, which did provide for the payment in 1818 of $20,000, and which could therefore be the basis for the disbursement of the $12,285.58 listed for 1818. However, the G.A.O. report shows that $125,285.58 was disbursed specifically under the 1818 Treaty, which only provided for payment of $120,000 plus the furnishing of two blacksmiths and strikers for three years. It does not appear therefore, that the $22,198 could have been a disbursement pursuant to the 1818 Treaty.

annuity of $1,200 can have been included in the payments made starting in 1803. There is no showing as to the dates of death of the other six chiefs allegedly entitled to $100 life annuities.

It is clear, however, from the face of the treaty that there was an obligation of at least $1,500 per year. For the years 1790 through 1797, and 1800 through 1809, a total of eighteen years, the Government's records do not specifically show payment of this $1,500 annuity, so I think we should assume that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 Treaty obligation. Thus, of the $99,461.45 shown by the Government's accounts to have been paid to the Creeks, but not allocated to specific treaties, there is at most $72,461.45 which can be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805.

Appellant also points to the Treaty of June 29, 1796, 7 [fol. 370] Stat. 56, and contends that some of the payments shown to have been made to the Creeks between 1803 and 1818 should be allocated to the 1796 Treaty. It may be noted, however, that all the payments listed in the G.A.O. report are labeled annuities, or goods for Chiefs. No expenditure under the 1796 Treaty could be so described, since that treaty provided for no annuity, or goods to chiefs. The 1796 Treaty obligations cannot, therefore, account for any of the payments shown to have been made to the Creeks from 1803 through 1818.

The amount of obligations under the 1802 and 1805 Treaties which are not specifically shown by the Government's accounts to have been fulfilled is, as noted above, $98,857.50. The Government's accounts are specific enough, in the absence of any other treaty provisions under which the unallocated payments which its accounts show to have been made could have been due, to show payment of $72,461.45 of that amount, leaving $26,396.05 which is not shown to have been paid. In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through

1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allowable to the Government against its 1802 and 1805 treaty obligations, given the state of its records.

Treaty of 1832

Under Article XIII of the Treaty of March 24, 1832, 7 Stat. 366, the United States agreed to expend $3,000 per year for twenty years for the education of Creek children. The parties agree that the total obligation under the 1832 Treaty was $60,000.

Appellant admits that the Government's records are sufficient to show payment of $49,938.99, and it claims the additional $10,061.01.

The Indian Claims Commission did not, for some reason, make any finding as to the additional credits against this claim asserted by the Government, but stated only that

> [fol. 371] There were disbursements for the period 1852 to 1861 in the amount of $60,673.23 * * * in fulfillment of the obligations of the treaties of 1832 and 1845 [9 Stat. 821] which defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

Appellant objects to the Commission's failure to make any finding as to whether or not the Government's obligation under the 1832 Treaty was fulfilled.

I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its face, the Commission's "finding" is merely a restatement of the Government's contention, and not a finding at all.

The Commission's "ultimate" finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final

determination and remand the case so that such findings may be made. *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 255.

Treaty of 1833

The Treaty of February 14, 1833, 7 Stat. 417, provided, in Article V:

> As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above [fol. 372] grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * * *.

Appellant claims that the Government's total obligation under this Article was $105,690 ($2,700 per year for 39 years), and that only $76,285.45 has been paid thereunder, so that a balance of $29,404.55 remains due.

In this instance appellee does not claim credit for more than the $76,285.45 which its records show it to have paid under the 1833 Treaty. Appellee's contention is that the size of the obligation under the 1833 Treaty was not adequately established. Appellant's position is that Congress fixed the amount of the treaty obligations by the size of annual appropriations which it made under the treaty.

The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for estab-

lishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had "not proven the alleged failures of the appellee to fulfill its obligations * * *". 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination.

I

Treaty of 1856

Under Article VI of the Treaty of August 7, 1856, 11 Stat. 699, the United States undertook to invest $200,000 in safe stocks, and to apply the interest of at least 5% per annum to the education of the Creeks. Appellant claims that the stipulated interest for the years 1857 through 1861, inclusive, a total of $50,000, was appropriated by Congress, but that appellee's records show distributions of only $21,000 pursuant to this obligation. Appellant claims the balance of $29,000. Appellee claims credit for two separate payments of the $29,000.

(1) First, appellee claims that the $29,000 was paid to the Creek Nation by the Confederate States of America, pursuant to a treaty, dated July 10, 1861, between the Con- [fol. 373] federate States and the Creek Nation. Appellee asserts that the Creek Nation's acceptance of the payment by the Confederate States of the United States' obligation discharged the United States' liability.

Appellant does not contest appellee's proposition of law, but denies that there was proper payment or, if there was, that it was validly accepted by the Creek Nation.

The Indian Claims Commission found:

> In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States.
>
> The Confederate States paid the $29,000 and plaintiff accepted the same.

> The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866.

Appellant argues that the Treaty of July 10, 1861, between the Creek Nation and the Confederate States, concluded at North Fork Village on the North Fork of the Canadian River, west of Arkansas, which provided for the payment of the $29,000 by the Confederate States, was only approved by some of the Creek chiefs without the action of the Creek Council, the governing body of the Creek Nation, and that the Creek Nation was about evenly divided in sympathies between the Union and the Confederacy.

I do not think that there is any evidence that the $29,000 was paid to the Creek Nation. The evidence shows that in Article XLI of the 1861 Treaty, the Confederate States agreed to pay the $29,000; that the Provisional Congress of the Confederate States appropriated the $29,000 on December 24, 1861; that on December 30, 1861, that amount was requisitioned by J. P. Benjamin, the Confederate Secretary of War, from the Confederate Secretary of the Treasury; that on the same date C. G. Memmenger, the Secretary of the Treasury, ordered a War Department Warrant No. 16 to be issued in favor of General Albert Pike, a War Department agent, for delivery to Major Elias Rector, Superintendent of Indian Affairs; that on Jan- [fol. 374] uary 1, 1862, S. S. Scott, Acting Commissioner of Indian Affairs, wrote to Major Rector at Fort Smith, Arkansas, informing him that the money was in the hands of General Pike for delivery to him; and that on January 28, 1862, General Pike wrote to Major Rector from Little Rock, Arkansas, informing him that he supposed he would reach Fort Smith in six days. It is true that there is no receipt for the $29,000, but in the light of the evidence which I have detailed, I think it was not improper for the Indian Claims Commission to conclude that the money

was received by the Indians. See *Chickasaw Nation* v. *United States*, *supra*, 103 Ct. Cl. at 35.

However, although the evidence may be sufficient to support a finding that a payment of $29,000 was made to some Creek Indians, there is no indication that this payment was made to the Creek Nation, as distinguished from some portion thereof. The obligation here was owed to the Creek Nation, and could not be satisfied by payment to any party other than the Creek Nation. Debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Therefore, a payment to any party other than the Creek Nation, even if that party was some portion of the Creek Nation, cannot have satisfied the obligation owed to the Creek Nation unless the party receiving payments was authorized to receive it on behalf of the Creek Nation. The evidence upon which appellee relies to show payment indicates that no payment was made to any party before January 28, 1862, on which date General Pike, the Confederate representative charged with delivering the money to the Creeks, was still at Little Rock, Arkansas. The evidence also indicates that after the treaty with the Confederacy had been signed on July 10, 1861, a considerable portion of the Creek Nation, under the leadership of Opoeth-le-yo-ho-la, was in sympathy with the Union. This group met in convention on August 5 and declared that the chiefs who had signed the Confederate treaty had forfeited their administrative rank. A "Non-Treaty Party" moved westward to avoid the reach of those who were sympathetic to the Confederate cause, and sent messengers to confer with representatives of the United States. The evidence also shows that by November 15, the Union-minded Creeks had withdrawn further north, toward the southern border of Kansas, and [fol. 375] that they fought a series of battles with Confederate forces along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861. The size of the group with Opoeth-le-yo-ho-la is estimated at around 2,000 men, plus women, children, and the sick and aged, in a total number of perhaps 6,000, estimated to be from one-half to three-fourths of the Creeks. It also appears that during the months of No-

vember and December representatives of the refugee Creek groups were treating with United States agents for relief for the refugees and arranging for the rendering of military assistance by the Creeks to the United States.

It seems to me to be clearly established by the evidence that the Creek Nation had become divided into two independent entities. It cannot be said that the portion which remained in the South constituted, after some time in November of 1861, the Creek Nation. Payment to this southern group cannot be said to have been payment of the obligation which was owed to the Creek Nation.

The record is barren of any evidence to show payment to an entity which could be called the Creek Nation. Indeed the evidence indicates, on the contrary, that payment was made to a body other than the Creek Nation, since it shows, as pointed out by appellee, that payment was made somewhere in the vicinity of Little Rock, Arkansas (that is, at the camp of the Southern group) some time after January 28, 1862 (that is, when the Creeks remaining in that vicinity no longer constituted the Creek Nation).

(2) The basis for appellee's second claim of credit for a second payment of the $29,000 is that the United States authorized payments, out of Creek annuities which had not yet been paid, for the benefit of refugee Indians during the Civil War. Resolution of February 22, 1862, 12 Stat. 614; that the $29,000 here in question was so used; and that the use of the annuities for that purpose was ratified and confirmed by appellant by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790.

The Supreme Court's decision in *Seminole Nation* v. *United States*, 316 U.S. 286, 290-291, supports appellee's legal position, if in fact the $29,000 here in question has been shown to have been disbursed for the benefit of refugee [fol. 376] Indians. In the *Seminole* case this court had found that the $61,563.42 in question had been diverted *and disbursed* by the Government.

While it is clear that payments were made by the United States for the benefit of refugee Indians, I do not think that there is substantial evidence in this case to support a finding that *the $29,000 in issue* was in fact paid to refugee

Indians. I note that the Indian Claims Commission did not so find. It found only that the United States Congress had approved such payment for the benefit of refugee Indians,[9] "which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790)."

The Treaty of 1866 approved and confirmed *expenditures made* by the United States since the diversion of annuities for that purpose. The fact that other annuity money was diverted for payment to the refugees does not establish that the United States' obligation for this $29,000 was released.

The evidence in this case shows that $343,321.47 was disbursed by the United States, during the years 1862 to 1867 for the relief of refugee Indians, under the appropriation entitled "Fulfilling Treaties with Creeks." Appellee says that Creek treaties in force during that period provided for a total of $229,260 in annuities payable to the Creeks. This figure appears to have been taken from the total amounts appropriated under Creek treaties by Congress in the fiscal years 1862-1866.

Appellee argues that because the amount expended for the relief of refugee Indians exceeded the total of the United States' obligations for the period in question by more than $29,000, the $29,000 due under Article VI of the Treaty of 1856 is shown to have been expended for the refugee Indians. This does not follow at all. There may well have been other outstanding Creek treaty obligations which formed the basis for the 1862-1867 expenditures. Indeed there must have been, since the excess of expenditures over current treaty obligations was considerably more than $29,000.

[fol. 377] Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856 Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the

[9] This approval was not specifically of the $29,000, but of all "annuities payable to the * * * Creeks * * * and which have not been paid." Resolution of February 22, 1862, 12 Stat. 614.

amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000.

For the foregoing reasons, I respectfully dissent.

[fol. 378] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 379]

SUPREME COURT OF THE UNITED STATES

No. 124, October Term, 1961

CREEK NATION, Petitioner,

—vs.—

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S. 134

No. [redacted]

Office-Supreme Court, U.S.
FILED
MAY 29 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

THE CREEK NATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

THE CREEK NATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, The Creek Nation of Indians, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled cause on March 1, 1961.

Opinion Below

The opinion of the United States Court of Claims is not as yet reported (Appendix, p. 28).

JURISDICTION

The opinion of the Court below (Appendix, p. 28) was entered on March 1, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. 1255, and Sections 20(b) and 20(c) of the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054, 25 U. S. C. Section 70s).

QUESTIONS PRESENTED

1. Whether the United States has an obligation to render a clear and accurate accounting of its dealings and the fulfillment of its treaty obligations owing to an Indian tribe in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race; or whether the United States is merely in a position of a debtor in its relationship under a treaty with an Indian tribe.

In other words, whether a fiduciary relationship exists between the United States and an Indian tribe (in this case the Creek Nation of Indians) requiring the United States to account strictly to the Indian tribe for the amounts disbursed by the United States in fulfillment of its treaty obligations; or whether the relationship is merely that of debtor-creditor.

2. Whether an Indian tribe can rely upon admissions contained in an accounting made by the accounting officers of the United States showing that the United States had failed to fulfill its treaty obligations to said tribe, and that balances are due and owing to the tribe under said treaty obligations of the United States.

3. Whether the United States has the burden of proving the credits it claims against amounts shown by its accounting to be due and owing an Indian tribe under treaty stipulations between the United States and an Indian tribe.

4. Whether the Court of Claims has discharged its duty as an appellate court under Section 20(b) of the Indian Claims Commission Act, when it, by a mere per curiam statement, affirms the findings and opinion of the Indian Claims Commission in a case wherein appellant raises serious objections with respect to the failure of the Commission to find facts essential to the proper disposition of the claims presented, or found facts which were not

supported by substantial evidence, or which were contrary to the record, when the above Act directs that the Court "shall" review the whole record and settle such questions.

5. Whether a denial of a writ of certiorari by this Court constitutes an approval of the decision of the lower court.

TREATIES AND STATUTES INVOLVED

The Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. 70-70v, provides in pertinent part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> "All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.
>
> "In determining the quantum of relief the Commission shall make appropriate deductions for all pay-

ments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; The Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * * *."

* * * *

"Sec. 20(b). When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

"(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended."

The treaties and other statutes involved in the claims of petitioner are printed in the Appendix pp. 23-27.

STATEMENT

The petitioner, the Creek Nation of Indians, brought an action before the Indian Claims Commission under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. §§ 70-70v, to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.

The petitioner (plaintiff-appellant below) alleged that the full amounts which the United States was obligated to pay to the Creek Nation as considerations due for cessions of Creek lands under these treaties were not in fact paid, and petitioner claimed the right to recover the unpaid balances.

The United States answered denying that any sums were due, owing and unpaid under the treaties in question. It also presented defenses of res judicata and release, which the Indian Claims Commission did not consider because it decided that the petitioner had not proved its case (Appendix p. 31).

The Creek Nation relied upon and introduced in evidence before the Indian Claims Commission a report of the Government's own General Accounting Office setting forth in detail all treaty payments made by the United States to the Creek Nation under the treaties in question, shown by the records which were maintained solely by the Government, and are now in the custody of the General Accounting Office. In other words, the Creek Nation

relied solely upon the accounting of disbursements under these treaties made by the Government's own accounting officers. These records do not specifically show that the entire amounts due under the treaties in issue were paid to the Creek Nation (Appendix p. 31).

Claims Under Treaties of 1802 and 1805

The parties agreed that the total obligation of the United States to the Creek Nation under Article II of the Treaty of June 16, 1802, 7 Stat. 68 (Appendix pp. 24, 32) was $317,000. The General Accounting Office report shows that the total amount specifically allocated to payments of the Government's obligation under this treaty was $254,690.25. The petitioner claimed that the unpaid balance of $62,309.75 was due and owing to it as disclosed by the Government's own accounting.

The parties agreed that the total obligation of the United States to the Creek Nation under Article III of the Treaty of November 14, 1805, 7 Stat. 96 was $206,000 (Appendix pp. 25, 32). The General Accounting Office report shows that the total amount specifically allocated to payments of the Government's obligations under this treaty was $169,452.25. The petitioner claimed that the unpaid balance of $36,547.75 was due and owing to it as disclosed by the Government's own accounting (Appendix p. 32).

The total amount claimed by petitioner under the Treaties of 1802 and 1805 was $98,857.50. The Indian Claims Commission failed to make proper findings to show that this amount was due petitioner (Appendix p. 32).

To meet the issue thus arising under these two treaties the United States introduced in evidence certain expenditures during the years 1803 through 1809, totaling $77,263.45 in goods and money forwarded to Creek Indians, under an earlier Treaty of August 7, 1790, 7 Stat. 35,

between the United States and the Creek Nation, *which was not in issue*, and which expenditures its own accounting office specifically allocated to expenditures under this 1790 treaty, and not to the Treaties of 1802 and 1805 in issue. With respect to these disbursements under the Treaty of 1790, the General Accounting Office report states that: "It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty." * The General Accounting Office, however, further stated that it could not specifically identify such amounts with the later treaties. (Appendix pp. 32-33).

Also the United States, in search for further credits under the Treaties of 1802 and 1805, injected into the case certain disbursements, totaling $22,198, made during the years 1811, 1815, 1817, and 1818, which the General Accounting Office report stated it could not identify with any specific treaty. The United States, nevertheless claimed these disbursements as credits against the balances shown in the General Accounting Office report to be due the Creek Nation under the Treaties of 1802 and 1805, without identifying them with these treaties (Appendix p. 33).

The United States contended that because the petitioner did not show that any of the total amounts of the credits claimed by the Government, or $99,461.45, were *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government was entitled to credit the entire amount against its obligations under those treaties. The

* Petitioner pointed out that the annual obligations of the United States under the Treaty of 1790 were at least $3,700.00, instead of the $1,500.00 shown by the General Accounting Office Report, because of an obligation to pay certain Creek Chiefs annual stipends during their lifetimes under a secret article of said treaty.

$99,461.45 exceeded the $98,857.50 claimed by petitioner to be due, so as to defeat petitioner's recovery under these two treaties (Appendix pp. 32-33).

The Indian Claims Commission adopted the Government's position and determined that nothing was due to petitioner (7 Ind. Cl. Comm. 117, Appendix, p. 37). In doing so the Commission relied largely on a decision of the Court of Claims supporting the Government's position in Chickasaw Nation v. United States (1945), 103 C. Cls. 1, certiorari granted but limited to the question of specific designation of offsets, and judgment reversed, 326 U. S. 217. The Indian Claims Commission, in relying upon this case rather than upon more recent decisions of the Court of Claims which overrule it, stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in Chickasaw] is evidence that it approved the holdings of the Court of Claims in reference to such matters." (7 Ind. Cl. Comm. at 135, Appendix pp. 37-38, 71). The Commission went on to say that the decision of that court in Sioux Tribe of Indians v. United States (1946), 105 C. Cls. 725, "could not overrule the [Chickasaw case] because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari." (7 Ind. Cl. Comm. at 137, Appendix pp. 37, 40-42, 71). This court has made it clear that no such inference is to be drawn from its denial of certiorari in any case (Dissenting opinion of Judge Littleton, Appendix, pp. 37-38).

The main issue in this case is thus presented.

Petitioner argued that the relationship between the United States and an Indian tribe is such that the Government had the burden of presenting an accurate accounting of its payments to petitioner pursuant to the treaties in question. Petitioner maintained therefore, that the Government was not entitled to credit for any amounts not

specifically allocated on its books to fulfillment of these treaties; and that the Government had the clear burden of proving the credits it claimed (Appendix p. 33).

Petitioner submits that the many decisions of this Court establish that the fiduciary relationship between the United States and the Indian tribes is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of accounting clearly for the fulfillment of its Indian treaty obligations (Appendix p. 33).

Claim Under Treaty of 1832

As a part of the consideration due the Creek Nation under Article XIII of the Treaty of March 24, 1832, 7 Stat. 366 (Appendix pp. 25, 45), the United States agreed to expend $3,000 per year for 20 years for the education of Creek children. The parties agreed that the total obligation under the Treaty of 1832 was $60,000.00. The Government's accounting report shows that $49,938.99 only was disbursed to fulfill its obligation, and shows a balance due the Creek Nation under this treaty obligation of $10,061.01, which petitioner claimed (Appendix p. 45).

The Indian Claims Commission failed to make any finding as to whether or not the Government's obligation under this 1832 Treaty was fulfilled, but merely restated the Government's contention (Appendix pp. 46, 60). Petitioner claims that the failure of the Commission to make such a material finding was error (Seminole Nation v. United States, 316 U.S. 286, 300; Seminole Nation v. United States, 316 U.S. 315, 316; Snake or Piute Indians v. United States (1953), 125 C. Cls. 241, 255).

Claim under Treaty of 1833

As a part of the consideration for the Treaty of February 14, 1833, 7 Stat. 417, the United States in Article V thereof, agreed "to furnish to the Creek Indians west of

the Mississippi, one blacksmith, and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed--also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * * *." (Appendix pp. 25-26, 46).

The General Accounting Office report showed that Congress fixed the amount for blacksmiths, etc. under this obligation at $1,700.00 per annum over a long period of time, 1834-1878 (Act of June 17, 1844, c. 108, 5 Stat. 704, 706; Appendix p. 26); and, therefore, the total obligation for blacksmiths and for education under this treaty was definitely fixed at $2,700. per annum, and for 39 years the total obligation of the United States thereunder was $105,690. The General Accounting Office report further shows that only $76,285.45 was paid thereunder, leaving a balance of $29,404.55 due and owing to the Creek Nation under this treaty obligation of the United States, which petitioner claimed (Appendix 47, 61).

The Indian Claims Commission held that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by petitioner was correct, in view of its holding that petitioner had "not proven the alleged failures of the United States to fulfill its obligations * *." 7 Ind. Cl. Comm. 138, Appendix pp. 61-62).

Petitioner on appeal to the Court of Claims contended that the Commission erred in failing to find the essential facts necessary to a proper disposition of this claim—that it should have found from the evidence before it what

the total obligation of the United States was under said treaty provisions, and whether or not it had been fulfilled by the United States. (Appendix p. 47).

Claim under Treaty of 1856

Under Article VI of the Treaty of August 7, 1856, 11 Stat. 699 (Appendix p. 27), as a part of the consideration for said treaty, the United States undertook to invest $200,000 in safe stocks and to apply the interest of at least 5% per annum to the education of the Creeks. The General Accounting Office report showed that the interest for the years 1857 through 1861, inclusive, a total of $50,000.00 was appropriated by Congress to fulfill this treaty obligation of the United States, but that only $21,000.00 was disbursed for the fulfillment of this treaty obligation during these years, and that $29,000.00 was due on this treaty obligation of the United States (Appendix pp. 47, 48, 62).

The United States claimed that the $29,000 was paid either by the Confederate States pursuant to a treaty made with the Creek Nation on July 10, 1861, or that this amount was disbursed by the United States for the relief of refugee Indians during the Civil War under authority of the Civil War Resolution of February 22, 1862, 12 Stat. 614, and that by Article VI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790, this diversion of Creek annuities was ratified and confirmed.

The petitioner contended that during the Civil War the Creek Nation was about evenly divided in its sympathies, and one-half or more of its members migrated to Kansas where they remained during the Civil War Period; that payment, if any was made, to that portion of the nation that went with the South would not be payment to the Creek Nation; and that there was no evidence in the record to show that the $29,000 claimed was actually disbursed for the relief of the members of the Creek Nation in Kansas.

The Indian Claims Commission found that a payment of this $29,000 was made to the southern portion of the Creek Nation; and further, that Congress authorized payment of Creek annuities to refugees in Kansas which might and could have included the $29,000 in question, and that the Creek Nation ratified such diversions under the Treaty of 1866, and denied recovery on this claim (Appendix pp. 47-53, 62-63).

Petitioner on appeal to the Court of Claims challenged the findings of the Commission on the ground that such findings were not supported by substantial evidence, and that no payment of the $29,000 due was ever shown by the evidence to have been made to the Creek Nation, to whom the treaty obligation of the United States was due and owing.

From the findings and holding of the Indian Claims Commission dismissing the several claims set forth in the petition (7 Ind. Cls. Comm. 117, 139; Appendix pp. 28-30, 74), the Creek Nation appealed to the Court of Claims under Section 20 (b) of the Indian Claims Commission Act. After full argument, the majority of the Court of Claims (3 Judges concurring), on March 1, 1961, merely by a per curiam statement, affirmed the findings and holdings of the Indian Claims Commission, thus perpetuating the errors made by the Indian Claims Commission, and completely failing to review the issues raised on appeal.

Judge Littleton, the Senior Judge of the Court who was joined by Judge Madden, wrote a dissenting opinion, the only opinion of the Court of Claims in this case, analyzing the findings and holdings of the Indian Claims Commission, and pointing out the errors made by the Commission, and upholding the claims of the Indians, in the instances set forth in this opinion (Appendix pp. 28-54).

The dissenting opinion pointed out as follows (Appendix, pp. 28-30):

"This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission. While the instant suit was not brought strictly as a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. * * * The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not

disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Court of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. * * In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail."

The dissent then analyzes the issues raised by the appeal in this case, and we believe correctly states the law governing this case; and for this reason we earnestly request this Court to grant the writ of certiorari herein, and adopt the views of the minority opinion, which is the only opinion written by the Court of Claims in this case.

REASONS FOR GRANTING THE WRIT

Petitioner submits that this Court should grant the writ of certiorari herein requested for the following reasons:

1. This case involves serious and important questions of federal Indian law, and presents entirely novel questions which have been raised for the first time under the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049), and go to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission, the settlement of which will serve as a general guide to their disposition. The mere per curiam statement of the majority of the Court of Claims failed to decide these questions, and we believe that the dissenting opinion of Judge Littleton, Senior Judge of that Court (now re-

tired), who was joined by Judge Madden, properly sets forth the law governing this case (Appendix pp. 28-53).

We submit that the per curiam statement of the Court of Claims, merely affirming the decision of the Indian Claims Commission without more, in a case wherein serious questions of fact and law are raised by the petitioner before that court, falls far short of meeting the obligation of the Court of Claims as an appellate court to give guidance to the court below (the Indian Claims Commission), and to the litigants in an appeal on novel and important matters, an obligation, which, until this time, the court has conscientiously fulfilled. (Dissenting opinion, Appendix pp. 28-30).

2. There is a wide divergence of opinion on the novel and important issues in this case between the decision of the Indian Claims Commission, as affirmed by a per curiam statement of the Court of Claims, and the able dissenting opinion of Judge Littleton concurred in by Judge Madden of the Court of Claims, which can only be resolved by this Court. Judges Littleton and Madden have written most of the decisions of the Court of Claims involving questions arising from the administration of the Indian Claims Commission Act, and in doing so have become extremely conversant with the applicable law, and we submit that their dissenting opinion correctly states the law applicable to this case.

Furthermore, the majority per curiam statement of the Court of Claims mistakes that court's function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeal in appeals from the District Courts, 28 U. S. C. § 1291; whereas Section 20(b) of the Indian Claims Commission Act is very explicit in defining the function of the Court of Claims in reviewing final determinations of the Commission, and requires that the Court "shall determine whether the findings of fact of the Commission are supported by substantial evidence, * *

and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, * *." (Appendix p. 30)

In the instant case serious objections were earnestly and fully raised and argued by the petitioner in that Court regarding the findings of the Commission and lack of essential findings by the Commission, and the mere per curiam statement of the majority of the Court of Claims does not review the failures of the Commission to make essential and proper findings of fact, and does not meet the obligation of that Court as an appellate court under the provisions of Section 20(b) of said Indian Claims Commission Act, and deprives the litigants of rights which Congress intended them to have in the final settlement of their claims under this Act.

3. The holding of the Indian Claims Commission, affirmed by the per curiam statement of the majority of the Court of Claims, is wholly contrary to the long line of decisions of this Court, in the following three respects:

a. In the language of the dissenting opinion of Judge Littleton (Appendix pp. 29, 33):

> "In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in a manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the

decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions.

* * * *

"I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties."

And in reviewing the decisions of this court holding that a general fiduciary relationship exists between the United States and the Indian tribes, the dissenting opinion of Judge Littleton further states (Appendix p. 34):

"The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to 'be judged by the most exacting fiduciary standards.' Seminole Nation v. United States, 316 U.S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in Cherokee Nation v. Georgia, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> "[The Indians] are in a state of pupilage. Their relation to the United States *resembles that of a ward to his guardian.*

"With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in Creek Nation v. United States, 295 U.S. 103, 109-110:

> "* * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
>
> "* * * It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests."

> "The Indian Claims Commission itself has recognized that a 'fiduciary relationship' exists between the Creek Nation and the United States. The Creek Nation v. United States, 2 Ind. Cl. Comm. 66, 114."

The dissenting opinion further reviews the decisions of this Court, holding that a fiduciary relationship exists between the United States and the Indian tribes. In United States v. Kagama, 118 U. S. 375 this Court said, "These Indian tribes *are* the wards of the Nation." 118 U. S. at 383. In Choctaw Nation v. United States, 119 U. S. 1, this Court reiterated what it said in the Kagama Case, and further defined the relationship of the United States to the Indian tribes, as follows:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." 119 U. S. at 27-28.

This Court repeated, in United States v. Payne, 264 U.S. 446, that with regard to the Indians,

> "• • • the United States occupies the position and assumes the responsibilities of virtual guardianship. • • •." 264 U. S. at 448.

Of particular importance is this Court's holding in Seminole Nation v. United States, 316 U. S. 286, which

involved the question of the handling of annuity payments to Indians. The Court stated:

> "• • • this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. 316 U.S. at 296-297."

In his dissenting opinion Judge Littleton further pointed out (Appendix pp. 38-39):

> "• • The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, said that the amounts there in question, a 'Treaty Fund' of annual appropriations for payment of treaty stipulations, i.e., for payment of a *debt* to the Indians, had 'exactly the same characteristics' as a 'Trust Fund' applied to the education of the Indians. The Court said, 'They are moneys belonging really to the Indians.' 210 U.S. at 81. That case clearly shows that the treatment of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, 'In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.'"

The Court of Claims has, up to the decision in this case, followed this Court's decisions holding that a fiduciary relationship exists between the United States and the Indian tribes. In Menominee Tribe v. United States (1944), 101 C. Cls. 10, 19, 20, the court held that it is "settled doctrine that the United States, as regards its

dealings with the property of the Indians, is a trustee," and described the relationship of the United States to the Indian tribes as that of "a debtor who stands in the position of a trustee or fiduciary toward his creditor", and further held that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee." In Chickasaw Nation v. United States (1955), 132 C. Cls. 359, 362, the Court characterized the Indians as "quasi wards" of the United States. In United States v. The Seminole Nation, Appeal No. 3-58, decided June 3, 1959, —— C.Cls. ——, 173 F. Supp. 784, 790, the Court said: "Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian 'wards'". Here the Court clearly stated that the nature of the relationship between the United States and Indian tribes in general is that of "a fiduciary relationship". And in Sioux Tribe v. United States (1946), 105 C. Cls. 725, 802, the Court clearly stated:

> "* * * The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting."

After reviewing the above decisions the dissenting opinion of Judge Littleton stated (Appendix p. 42):

> "The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial

> records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account of the payments it makes pursuant to its obligations to the Indians."

We believe that this dissenting opinion correctly reflects the decisions of this Court, and that the per curiam statement of the Court of Claims is wholly contrary to the decisions of this Court which clearly hold that a fiduciary relationship does exist between the United States and the petitioner, the Creek Nation of Indians.

b. The majority per curiam statement of the Court of Claims is contrary to the holdings of this Court and its own holdings—that the failure of the Commission to make essential findings of fact, or makes findings not supported by substantial evidence—is reversible error. Seminole Nation v. United States, 316 U. S. 286, 300; Seminole Nation v. United States, 316 U. S. 315-316; Snake or Piute Indians v. United States (1953), 125 C. Cls. 241, 255.

c. The majority per curiam statement of the Court of Claims, in holding that a denial of a writ of certiorari is tantamount to the approval of this court of such decision, is wholly contrary to the decisions of this court, as pointed out in the dissenting opinion.

This court has held that no such inference is to be drawn from its denial of certiorari in any case. United States v. Shubert, 348 U. S. 222, 228-229; Sunal v. Large, 332 U. S. 174, 181; House v. Mayo, 324 U. S. 42, 48; Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 403-404; United States v. Carver, 260 U. S. 482, 490; Hamilton-Brown Shoe Co. v. Wolf Bros. and Co., 240 U. S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in Darr v. Burford, 339 U. S. 200, 226-228, wherein he stated at page 226:

> "The significance of a denial of a petition for certiorari ought no longer to require discussion. This

> Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.
>
> • • • •
>
> "Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner."

We submit that the dissenting opinion of Judge Littleton, joined in by Judge Madden, the only opinion of the Court of Claims in this case, correctly sets forth and applies to the claims presented in this case the applicable principles of law laid down by this Court.

CONCLUSION

We submit that it is the function of an appellate court to settle the law, and not to create confusion by failing to abide by the long line of decisions of this Court applicable to this case; and the mere per curiam statement of the majority of the Court of Claims which has failed to settle the issues in this case, has created the problems which have necessitated petitioner's request that this Court grant certiorari to review the novel and important questions presented in this case, and adopt the views of the dissenting opinion of Judges Littleton and Madden, which are clearly in accord with the long line of decisions of this Court.

Respectfully submitted,

THE CREEK NATION OF INDIANS,
Petitioner,

PAUL M. NIEBELL,
Attorney for Petitioner.

APPENDIX

Statutes and Treaties Involved

The treaties between the United States and the Creek Nation herein involved, provide in part as follows:

Treaty of August 7, 1790, 7 Stat. 35, 2 Kapp. 25.

"Article II. The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whosoever; * *

"Article IV. * * it is hereby agreed, in addition to the considerations heretofore made for the said land, that the United States will cause certain valuable Indian goods now in the state of Georgia, to be delivered to the said Creek nation; and the said United States will also cause the sum of one thousand five hundred dollars to be paid annually to the said Creek nation. * *

"Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned them by the Creeks for cultivation for themselves and their successors in office; but they shall be precluded exercising any kind of traffic.

Article XIV. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President

of the United States, with the advice and consent of the Senate of the United States."

Treaty of June 16, 1802, 7 Stat. 68, 2 Kapp. 58.

"Article II. The Commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. And it is further agreed that the United States shall furnish to the said nation two sets of blacksmiths tools, and men to work them, for the term of three years.

"Article IV. The contracting parties to these presents, do agree that this treaty shall became obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof."

Treaty of November 14, 1805, 7 Stat. 96, 2 Kapp. 85.

"Art. III. It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article, as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Ocmulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonably signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest: The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

"Art. V. The President of the United States may cause the line to be run from the high shoals of Apalacha, to the mouth of Uleofauhatche, at such time, and in such manner, as he may deem proper, and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Treaty of March 24, 1832, 7 Stat. 366, 2 Kapp. 341.

"Art. XIII. * * * Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. * * *"

"Art. XV. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States."

Treaty of February 14, 1833, 7 Stat. 417, 2 Kapp. 388.

"Art. V. As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with

the present amicable and satisfactory adjustment of their difficulties with the Cherokees; experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * *."

"Art. IX. This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

The Act of June 17, 1844, c. 108, 5 Stat. 704, 706, defined the annual obligation of the United States under this treaty as follows:

"For blacksmith and assistant, and use of shop and tools, during the pleasure of the President, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, eight hundred and forty dollars;

"For iron and steel, two hundred and seventy dollars;

"For wagonmaker, stipulated in the fifth article of the treaty of fourteenth February eighteen hundred and thirty-three, six hundred dollars;

* * * *

"For education, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, one thousand dollars; * * *."

The Treaty of August 7, 1856, 11 Stat. 699, 2 Kapp. 756.

"Art. VI. In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * *

"Art. XXVI. This convention * * * shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States."

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 3-59

(Decided March 1, 1961)

THE CREEK NATION v. THE UNITED STATES

Paul M. Niebell for appellant.

Keith Browne, with whom was *Assistant Attorney General Perry W. Morton*, for appellee.

OPINION

PER CURIAM: This suit was filed with the Indian Claims Commission (Docket No. 292) to recover sums alleged to be due the Indians under certain treaties entered into between the Creek Nation and the United States. The Commission entered findings of fact and an opinion pursuant to which a judgment of dismissal was entered. The Creek Nation appeals here from that decision.

Upon consideration of the record below, as well as the briefs and argument of counsel in this court, and the court being in agreement with the disposition of the case made by the Indian Claims Commission, its judgment of dismissal is affirmed.

It is so ordered.

LITTLETON, *Judge* (*Ret.*), with whom MADDEN, *Judge*, concurs, dissenting:

This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first

time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission. While the instant suit was not brought strictly as a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. In the *Iowa Tribe of the Iowa Reservations in Kansas and Nebraska, et cetera* case, Docket No. 70, decided June 19, 1952, 2 Ind. Cl. Comm. 167, 176, the Commission stated that:

> In its dealings with the Tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations.

The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment

(Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligaion which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. It provides:

> On said appeal the Court *shall* determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. • • • [Emphasis supplied.] 25 U.S.C. § 70s(b).

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail.

This is an appeal from a decision of the Indian Claims Commission. Appellant, the Creek Nation, brought an action under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. §§ 70-70v, to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.[1] Appellant alleged that the full amounts which the United States was obligated to pay to appellant under these treaties were not in fact paid, and appellant claimed the right to recover the unpaid balances. The United States denied that any sums were due, owing or unpaid under the treaties in question. It also presented defenses of res judicata and release.[2]

This case involves the question of whether appellant made a sufficient showing that the Government did not fulfill its treaty obligations.

Appellant introduced in evidence before the Indian Claims Commission the records of treaty payments to appellant which were maintained by the Government and are now in the custody of the General Accounting Office. These records do not specifically show that the entire amounts due under the various treaties in issue were paid to appellant.

The amounts claimed by appellant are $62,309.75 under the Treaty of 1802, $36,547.75 under the Treaty of 1805, $10,061.01 under the Treaty of 1832, $29,404.55 under the Treaty of 1833, and $29,000 under the Treaty of 1856. The total claimed is $167,323.06.

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[1] The treaties involved are those of June 16, 1802, 7 Stat. 68; November 14, 1805, 7 Stat. 96; March 24, 1832, 7 Stat. 366; February 14, 1833, 7 Stat. 417; and August 7, 1856, 11 Stat. 699.

[2] Because of its resolution of this case on the ground that appellant had not proved its case, the Indian Claims Commission did not deal with the issues of res judicata and the effect of the release given by appellant in 1856. These issues will not, therefore, be dealt with in this dissenting opinion.

I think that appellant established its claim to $26,396.05 of that amount. Another $29,000 appears to be due appellant, but the Government should have the opportunity upon remand to the Commission to show that the amount was paid. As to an additional $39,465.56, the Commission did not make certain essential findings of fact, and that portion of the case should have been remanded for such findings.

The basic issue in this case can be understood by a preliminary look at the problems arising in connection with the Treaties of 1802 and 1805.

With respect to the 1802 Treaty, 7 Stat. 68, the parties agree that the total obligation under Article II was $317,000. The General Accounting Office report shows the amount specifically allocated to payment of obligations under the 1802 Treaty to be $254,690.25. The parties also agree that the total obligation under Article III of the 1805 Treaty, 7 Stat. 96, was $206,000. The G.A.O. report shows $169,452.25 as disbursements made in connection with the 1805 Treaty. Appellant claims, therefore, that there is an unpaid balance of $62,309.75 due under the 1802 Treaty, and of $36,547.75 under the 1805 Treaty, making a total under the two treaties of $98,857.50, and it complains of the Commission's failure to so find.

The G.A.O. report also shows that, during the years 1803 through 1809, a total of $77,263.45, in money and goods, was paid and forwarded to the Creek Indians.[3]

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[3] Appellant's contention that the fact that the section of the G.A.O. report which lists these disbursements is labeled "* * * information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians *pursuant to the Treaty of August 7, 1790, 7 Stat. 35*" (emphasis supplied) shows that the disbursements had no relation to the 1802 or 1805 Treaties is negatived by the statements in the body of the section that the payments could not be definitely attributed to any particular treaty, and also by the separate listing within the section of other disbursements which could be allocated definitely to the 1790 Treaty.

For the years 1811, 1815, 1817 and 1818, payments totaling $22,198 are shown to have been made to the Creeks. No part of this total amount of $99,461.45 was allocated by the G.A.O. report to any particular treaty.

Appellee's contention is that, because appellant did not show that any of this $99,461.45 was *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government is entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeds the $98,857.50 claimed by appellant to be due, so appellee's theory would defeat recovery under these two treaties. The Indian Claims Commission adopted the Government's position and determined that nothing was due to appellant. 7 Ind. Cl. Comm. 117.

Appellant argues that the relationship between the United States and an Indian tribe is such that the Government has the burden of presenting an accurate accounting of its payments to appellant pursuant to the treaties in question. Appellant maintains, therefore, that the Government is not entitled to credit for any amounts not specifically allocated on its books to fulfillment of these treaties.

I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties.

I also think, however, that appellant here has attempted to draw a more ambitious conclusion than is warranted from the fact of its relationship with the Government. While the Government had the duty to clearly account for its performance of its treaty obligations, I think that it has done so when it has shown payments to the Creek Nation which, although not specifically labeled as pay-

ments pursuant to the treaties in question, are sufficiently identified in the Government's records to show that they could have been nothing other than payments pursuant to those treaties. For example, if payments labeled "annuities for the Creeks under Creek treaties" are listed in the Government's records for years in which no treaty other than the treaty in question was in force, the conclusion is warranted that the payments were made under the treaty in question.

THE RELATIONSHIP BETWEEN THE PARTIES

The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to "be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> [The Indians] are in a state of pupilage. Their relation of the United States *resembles that of a ward to his guardian.*

With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in *Creek Nation* v. *United States*, 295 U.S. 103, 109-110:

> • • • The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
>
> • • • It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

The Indian Claims Commission itself has recognized that a "fiduciary relationship" exists between the Creek

Nation and the United States. *The Creek Nation* v. *United States*, 2 Ind. Cl. Comm. 66, 114.

The Supreme Court further defined and established the nature of the relationship between the Government and the Indian tribes as similar to that of guardian and ward in *United States*, v. *Kagama*, 118 U.S. 375, where the Court said, "These Indian tribes *are* the wards of the Nation." 118 U.S. at 383.

Appellee places great reliance upon an 1886 decision of this court, *Choctaw Nation* v. *United States*, 21 Ct. Cl. 59, where it was said that the cases "fall far short of holding that the rules of law as applicable to controversies between guardian and ward are to prevail in suits between the United States and the Indian tribes." 21 Ct. Cl. at 92-93. Appellee has overlooked the fact that the decision was reversed by the Supreme Court, in *Choctaw Nation* v. *United States*, 119 U.S. 1, and that the Supreme Court said:

> As was said by this court recently in the case of the *United States* v. *Kagama*, 118 U.S. 375, 383: "These Indian Tribes *are* the wards of the Nation; they are communities *dependent* on the United States; • • •"
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> • • • •
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> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulat-

> ing the rights and obligations of private persons, equally subject to the same laws. 119 U.S. at 27-28.

The Court repeated, in *United States* v. *Payne*, 264 U.S. 446, that, with regard to the Indians,

> • • • the United States occupies the position and assumes the responsibilities of virtual guardianship. • • •. 264 U.S. at 448.

Of particular importance is the Supreme Court's ruling in *Seminole Nation* v. *United States*, 316 U.S. 286, which involved the question of the handling of annuity payments to Indians. It is true that the treaty had set up a "trust fund" out of the interest from which the annuities were to be paid. But the Supreme Court did not base its conclusion upon the "trust nature" of the particular fund involved. The Court stated:

> • • • this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. 316 U.S. at 296-297.

The Court made clear that the Government's fiduciary responsibilities derive from the *status* of the "dependent and sometimes exploited" Indians, and that the Government bears these responsibilities "*in its dealings*" with the Indians, not, as defendant would have it, merely in connection with those particular dealings which, when occurring between two equal parties, would give rise to fiduciary duties.

The Indian Claims Commission relied heavily, in its decision of this case, upon *Chickasaw Nation* v. *United States*, 103 Ct. Cl. 1, certiorari granted, limited to question of specific designation of offsets, and judgment reversed, 326 U.S. 217. That case does support appellee's position, but does not have the weight attributed to it by the Indian Claims Commission as a result of the Commission's misconception of the meaning of the Supreme Court's denial of certiorari as to the issues relevant to this case.

In *Chickasaw* the Government's records showed that it had purchased annuity goods for various tribes, but did not show how much of these goods had been allocated to the Chickasaws as distinguished from the other tribes. This court said, "Unless this allocation is known, the shortage, if any, in the goods annuity of $3,000 cannot be ascertained. The accounts show no shortage for which judgment may be given." 103 Ct. Cl. at 35-36. It should be noted, however, that the problem did not receive extended consideration by this court in *Chickasaw*. The Indian Claims Commission, however, in relying upon *Chickasaw* rather than upon more recent decisions of this court which support the conclusion which I would reach, stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in *Chickasaw*] is evidence that it approved the holdings of the Court of Claims in reference to such matters." 7 Ind. Cl. Comm. at 135. The Commission went on to say that the decision of this court in *Sioux Tribe of Indians* v. *United States*, 105 Ct. Cl. 725, *infra*, "could not overrule the [*Chickasaw* case] because the *Sioux* case is a Court of Claims opinion only, while the holdings in the *Chickasaw* case were approved by the Supreme Court by its refusal to grant a writ of certiorari." 7 Ind. Cl. Comm. at 137.

The Supreme Court has made clear that no such in-

ference is to be drawn from its denial of certiorari in any case.[4]

The Government strenuously urges that the fact that appellant and the Government stand in a creditor-debtor relation precludes the conclusion that it owes appellant the duties of a trustee. The Government's contention is expressly negatived by the language of this court in *Menominee Tribe* v. *United States*, 101 Ct. Cls. 10, 20, where the court stated that the Government is "a debtor who stands in the position of a trustee or fiduciary toward his creditor," when the creditor is an Indian tribe. The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, said that the amounts there in question, a "Treaty Fund" of annual appropriations for payment of treaty stipulations, i.e., for payment of a *debt* to the Indians, had "exactly the same characteristics" as a "Trust Fund" applied to the education of the Indians. The Court said, "They are moneys belonging really to the Indians." 210 U.S. at 81.[5] That case clearly shows that the treatment

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[4] *United States* v. *Shubert*, 348 U.S. 222, 228-229; *Sunal* v. *Large*, 332 U.S. 174, 181; *House* v. *Mayo*, 324 U.S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U.S. 401, 403-404; *United States* v. *Carver*, 260 U.S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U.S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in *Darr* v. *Burford*, 339 U.S. 200, 226-228, where he stated at page 226:

"The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.

* * * * *

"Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner."

[5] The Government, in its brief in this case, acknowledges that the "treaty stipulations made the basis of claim herein, and the allegations of the petition respecting them fall into" the category which the Supreme Court in *Quick Bear* v. *Leupp* described as "the Indians' money".

of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, "In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party."

This court has recognized that it is "settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19. In that case, the Government was merely a debtor, yet the court held that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee." 101 Ct. Cl. at 19. The duty there imposed on the Government was that of seeing to it that the Indians' property—claims against the Government—was productive of an income. This is certainly more than the duty of an ordinary debtor, and no less rigorous than the duty of keeping a clear account of the Indians' claims. The court characterized the Government's position as that of "debtor-with-the-duties-of-a-trustee", 101 Ct. Cl. at 19 (and has recently characterized the Indians as "*quasi wards*", *Chickasaw Nation* v. *United States*, 132 Ct. Cls. 359, 362).[8]

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[8] This court's language in *Gila River Pima-Maricopa Indians* v. *United States*, 135 Ct. Cl. 180, 189, relied on by the Government, is not to the contrary. All that was said in that case was that the *precise*, *formal* guardian-ward relationship between the United States and an Indian tribe is created by treaty or other specific provision, while in the absence of such express provision the relationship is one which is similar to or resembles the technical guardian-ward relationship, as was held in *Creek Nation* v. *United States*, 318 U.S. 629, 642; *Seminole Nation* v. *United States*, 316 U.S. 286; and *Menominee Tribe of Indians* v. *United States*, 142 Ct. Cl. 555.

This court's opinion in the recent case of *United States* v. *The Seminole Nation*, Appeal No. 3-58, decided June 3, 1959, — Ct. Cl. —, 173 F. Supp. 784, 790, makes clear that all the *Gila River* case

I think that the above discussion indicates that the debt owed to an Indian tribe pursuant to a treaty must be "dealt with by the Government as if it belonged to [the Indians], as morally it does", *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, *supra*, and that the Government is bound by duties of trust in dealing with this money. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19, *supra*. The decision of this court in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 725,[7] is, therefore, directly applicable here.

> The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.

In the *Sioux* case, the Indians sought to recover certain amounts disbursed by the Government from trust funds which had arisen from the sale of lands belonging

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said was that while "preciseness" in the relationship is found in the particular treaty provision, the nature of the relationship between the United States and Indian tribes in general is that of "a fiduciary relationship". The court said (173 F. Supp. at 790):

"Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian 'wards'."

I am also aware of what was said in *Kansas or Kaw Tribe of Indians* v. *United States*, 80 Ct. Cl. 264, 301-302, *cert. denied*, 296 U.S. 577, to the effect that a treaty provision similar to that of Article II of the 1790 Creek Treaty did not create a guardian-ward relationship. That case was decided on December 3, 1934, prior to the Supreme Court's decision in *Creek Nation* v. *United States*, *supra*, announced on April 29, 1935. I think that the *Creek* case vitiates any broad force of this language in the *Kansas* case, which can mean only that a *technical* guardian-ward relationship does not exist. *See United States* v. *Seminole Nation*, *supra*, 173 F. Supp. 784, 790. For the same reason the language in *Omaha Tribe of Nebraska* v. *United States*, 6 Ind. Cl. Comm. 68, 71-74, is of doubtful validity, and is based primarily on the *Kansas* case and a misinterpretation of the *Gila River* case.

[7] Certiorari granted, judgment vacated, and case remanded to Court of Claims for determination as to whether plaintiff-petitioner could assert any additional claims, 329 U.S. 685; supplemental petition dismissed, 112 Ct. Cl. 50; *cert. denied*, 337 U.S. 908.

to the Indians. The disbursements had been made by the Government for certain Indian agency and educational expenses. The Indians claimed that the disbursements were for obligations of the Government, so that they should not have been paid out of the Indians' funds. The Government maintained that the expenditures were proper charges against the Indians' funds since they were expenditures for the benefit of the Indians, and argued that the Indians had the burden of showing what portion of the disbursements were for obligations of the Government. It said that in the voluminous accounting as to the claims presented it could not be expected to detail with exactness the purposes and amounts of the many disbursements, and that the burden rested on the Indians to prove such details. The court held, however, that the "primary duty to so classify and report as to the nature and the amount of disbursements rested on defendant." 105 Ct. Cl. at 802.

The court said:

> Since the Government obligated itself in the treaty and the agreements of 1868, 1877, and 1889 to provide agencies, aid and assistance, schools, and instruction, the burden is on defendant to show what portion, if any, of such expenses has not been assumed by it and should be charged to the Indians. *The Government cannot escape its primary obligations by including, among improper charges against the Indians, expenditures which it now says, without proof, may have been to some unknown and unascertainable extent proper charges against the Indians.* The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802. [Emphasis supplied.]

The Indian Claims Commission attempted to distinguish the *Sioux* case on the grounds that it involved a "trust fund" whose handling was "governed by the rules applying to trustee and guardian," while the present case "only involves the relationship of * * * ordinary debtor and

creditor." 7 Ind. Cl. Comm. at 135-136. Since, as has been demonstrated above, an Indian tribe and the Government are not "ordinary debtor and creditor", and the Government's handling of its debts to the Indians is in fact "governed by the rules applying to trustee and guardian", the *Sioux* case is very much in point here.

The relationship between the United States and appellant is not *precisely* that of guardian and ward, but their relationship is sufficiently similar thereto to impose upon the United States the duty of maintaining a clear and unambiguous account of its payments to appellant under its various treaty commitments.

The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical understanding of the problems involved in this particular aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account of the payments it makes pursuant to its obligations to the Indians.

Treaties of 1802 and 1805

As was pointed out in the introductory section of this opinion, appellant is claiming an unpaid balance of $98,857.50 under the Treaties of 1802 and 1805. The Government claims credit for $99,461.45, an amount which the Government's records do not specifically show to have

been paid under these treaties. In the light of what I believe to be the nature of the relationship between the parties in this case, I think that the Government is entitled to credit for only that portion of the $99,461.45 which is sufficiently identified in its records as having been paid under the 1802 and 1805 Treaties.*

To show that some of the unallocated $99,461.45 could have been disbursed pursuant to treaties other than those of 1802 and 1805, appellant points to the Treaty of August 7, 1790, 7 Stat. 35, Article IV of which provided that the United States pay to the Creeks an annuity of $1,500. The United States also undertook to furnish domestic animals, farm implements, and interpreters to the Creeks. Appellant claims that the obligation to provide interpreters was worth $400 per year, and that the 1790 Treaty contained a secret article which obligated the United States to pay to Creek Chief Alexander Mc-

* The G.A.O. report lists disbursements totaling $22,198 in a section which says that it contains information relating to disbursements made during the years 1811 to 1834. Appellant therefore points to some ten treaties other than those of 1802 and 1805 between the Creek Nation and the United States which were in force during that period (Treaties of 1790, 1796, 1814, 1818, 1821, 1825, 1826, 1827, 1832 and 1833), and argues that the $22,198 may have been disbursed pursuant to some one of these treaties. We note, however, that although the section contains payments made from 1811 to 1834, the $22,198 in question is listed as having been paid in 1811, 1815, 1817 and 1818. It cannot, therefore, have been paid pursuant to any of the six treaties concluded after 1818. The effect of the 1790 and 1796 Treaties is discussed in the body of the opinion. The Treaty of August 9, 1814, 7 Stat. 120, does not appear to provide for any payments such as those listed for 1815, 1817 or 1818. That leaves the Treaty of January 22, 1818, 7 Stat. 171, which did provide for the payment in 1818 of $20,000, and which could therefore be the basis for the disbursement of the $12,285.58 listed for 1818. However, the G.A.O. report shows that $125,285.58 was disbursed specifically under the 1818 Treaty, which only provided for payment of $120,000 plus the furnishing of two blacksmiths and strikers for three years. It does not appear therefore, that the $22,198 could have been a disbursement pursuant to the 1818 Treaty.

Gillivray an annual stipend of $1,200, and to each of six other chiefs annual stipends of $100 for life. Appellant thus claims that the 1790 Treaty established a yearly obligation on the United States of $3,700. Appellee points out that there is no evidence of any secret article in the 1790 Treaty. Chief Alexander McGillivray died in 1793, so no part of his life annuity of $1,200 can have been included in the payments made starting in 1803. There is no showing as to the dates of death of the other six chiefs allegedly entitled to $100 life annuities.

It is clear, however, from the face of the treaty that there was an obligation of at least $1,500 per year. For the years 1790 through 1797, and 1800 through 1809, a total of eighteen years, the Government's records do not specifically show payment of this $1,500 annuity, so I think we should assume that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 Treaty obligation. Thus, of the $99,461.45 shown by the Government's accounts to have been paid to the Creeks, but not allocated to specific treaties, there is at most $72,461.45 which can be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805.

Appellant also points to the Treaty of June 29, 1796, 7 Stat. 56, and contends that some of the payments shown to have been made to the Creeks between 1803 and 1818 should be allocated to the 1796 Treaty. It may be noted, however, that all the payments listed in the G.A.O. report are labeled annuities, or goods for Chiefs. No expenditure under the 1796 Treaty could be so described, since that treaty provided for no annuity, or goods to chiefs. The 1796 Treaty obligations cannot, therefore, account for any of the payments shown to have been made to the Creeks from 1803 through 1818.

The amount of obligations under the 1802 and 1805 Treaties which are not specifically shown by the Govern-

ment's accounts to have been fulfilled is, as noted above, $98,857.50. The Government's accounts are specific enough, in the absence of any other treaty provisions under which the unallocated payments which its accounts show to have been made could have been due, to show payment of $72,461.45 of that amount, leaving $26,396.05 which is not shown to have been paid. In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allowable to the Government against its 1802 and 1805 treaty obligations, given the state of its records.

Treaty of 1832

Under Article XIII of the Treaty of March 24, 1832, 7 Stat. 366, the United States agreed to expend $3,000 per year for twenty years for the education of Creek children. The parties agree that the total obligation under the 1832 Treaty was $60,000.

Appellant admits that the Government's records are sufficient to show payment of $49,938.99, and it claims the additional $10,061.01.

The Indian Claims Commission did not, for some reason, make any finding as to the additional credits against this claim asserted by the Government, but stated only that

> There were disbursements for the period 1852 to 1861 in the amount of $60,673.23 * * * in fulfillment of the obligations of the treaties of 1832 and 1845 [9 Stat. 821] which defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

Appellant objects to the Commission's failure to make any finding as to whether or not the Government's obligation under the 1832 Treaty was fulfilled.

I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its face, the Commission's "finding" is merely a restatement of the Government's contention, and not a finding at all.

The Commission's "ultimate" finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final determination and remand the case so that such findings may be made. *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 255.

TREATY OF 1833

The Treaty of February 14, 1833, 7 Stat. 417, provided, in Article V:

> As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants

> to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * * *.

Appellant claims that the Government's total obligation under this Article was $105,690 ($2,700 per year for 39 years), and that only $76,285.45 has been paid thereunder, so that a balance of $29,404.55 remains due.

In this instance appellee does not claim credit for more than the $76,285.45 which its records show it to have paid under the 1833 Treaty. Appellee's contention is that the size of the obligation under the 1833 Treaty was not adequately established. Appellant's position is that Congress fixed the amount of the treaty obligations by the size of annual appropriations which it made under the treaty.

The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had "not proven the alleged failures of the appellee to fulfill its obligations * * *". 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination.

Treaty of 1856

Under Article VI of the Treaty of August 7, 1856, 11 Stat. 699, the United States undertook to invest $200,000 in safe stocks, and to apply the interest of at least 5% per annum to the education of the Creeks. Appellant claims that the stipulated interest for the years 1857 through 1861, inclusive, a total of $50,000, was appropriated by Congress, but that appellee's records show

distributions of only $21,000 pursuant to this obligation. Appellant claims the balance of $29,000. Appellee claims credit for two separate payments of the $29,000.

(1) First, appellee claims that the $29,000 was paid to the Creek Nation by the Confederate States of America, pursuant to a treaty, dated July 10, 1861, between the Confederate States and the Creek Nation. Appellee asserts that the Creek Nation's acceptance of the payment by the Confederate States of the United States' obligation discharged the United States' liability.

Appellant does not contest appellee's proposition of law, but denies that there was proper payment or, if there was, that it was validly accepted by the Creek Nation.

The Indian Claims Commission found:

> In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States.
>
> The Confederate States paid the $29,000 and plaintiff accepted the same.
>
> The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866.

Appellant argues that the Treaty of July 10, 1861, between the Creek Nation and the Confederate States, concluded at North Fork Village on the North Fork of the Canadian River, west of Arkansas, which provided for the payment of the $29,000 by the Confederate States, was only approved by some of the Creek chiefs without the action of the Creek Council, the governing body of the Creek Nation, and that the Creek Nation was about evenly divided in sympathies between the Union and the Confederacy.

I do not think that there is any evidence that the $29,000 was paid to the Creek Nation. The evidence shows that in Article XLI of the 1861 Treaty, the Confederate States agreed to pay the $29,000; that the Provisional Congress of the Confederate States appropriated the $29,000 on December 24, 1861; that on December 30, 1861, that amount was requisitioned by J. P. Benjamin, the Confederate Secretary of War, from the Confederate Secretary of the Treasury; that on the same date C. G. Memmenger, the Secretary of the Treasury, ordered a War Department Warrant No. 16 to be issued in favor of General Albert Pike, a War Department agent, for delivery to Major Elias Rector, Superintendent of Indian Affairs; that on January 1, 1862, S. S. Scott, Acting Commissioner of Indian Affairs, wrote to Major Rector at Fort Smith, Arkansas, informing him that the money was in the hands of General Pike for delivery to him; and that on January 28, 1862, General Pike wrote to Major Rector from Little Rock, Arkansas, informing him that he supposed he would reach Fort Smith in six days. It is true that there is no receipt for the $29,000, but in the light of the evidence which I have detailed, I think it was not improper for the Indian Claims Commission to conclude that the money was received by the Indians. See *Chickasaw Nation* v. *United States*, *supra*, 103 Ct. Cl. at 35.

However, although the evidence may be sufficient to support a finding that a payment of $29,000 was made to some Creek Indians, there is no indication that this payment was made to the Creek Nation, as distinguished from some portion thereof. The obligation here was owed to the Creek Nation, and could not be satisfied by payment to any party other than the Creek Nation. Debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Therefore, a payment to any party other than the Creek Nation, even if that party was some portion

of the Creek Nation, cannot have satisfied the obligation owed to the Creek Nation unless the party receiving payment was authorized to receive it on behalf of the Creek Nation. The evidence upon which appellee relies to show payment indicates that no payment was made to any party before January 28, 1862, on which date General Pike, the Confederate representative charged with delivering the money to the Creeks, was still at Little Rock, Arkansas. The evidence also indicates that after the treaty with the Confederacy had been signed on July 10, 1861, a considerable portion of the Creek Nation, under the leadership of Opoeth-le-yo-ho-la, was in sympathy with the Union. This group met in convention on August 5 and declared that the chiefs who had signed the Confederate treaty had forfeited their administrative rank. A "Non-Treaty Party" moved westward to avoid the reach of those who were sympathetic to the Confederate cause, and sent messengers to confer with representatives of the United States. The evidence also shows that by November 15, the Union-minded Creeks had withdrawn further north, toward the southern border of Kansas, and that they fought a series of battles with Confederate forces along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861. The size of the group with Opoeth-le-yo-ho-la is estimated at around 2,000 men, plus, women, children, and the sick and aged, in a total number of perhaps 6,000, estimated to be from one-half to three-fourths of the Creeks. It also appears that during the months of November and December representatives of the refugee Creeks groups were treating with United States agents for relief for the refugees and arranging for the rendering of military assistance by the Creeks to the United States.

It seems to me to be clearly established by the evidence that the Creek Nation had become divided into two independent entities. It cannot be said that the portion which remained in the South constituted, after

some time in November of 1861, the Creek Nation. Payment to this southern group cannot be said to have been payment of the obligation which was owed to the Creek Nation.

The record is barren of any evidence to show payment to an entity which could be called the Creek Nation. Indeed the evidence indicates, on the contrary, that payment was made to a body other than the Creek Nation, since it shows, as pointed out by appellee, that payment was made somewhere in the vicinity of Little Rock, Arkansas (that is, at the camp of the Southern group) some time after January 28, 1862 (that is, when the Creeks remaining in that vicinity no longer constituted the Creek Nation).

(2) The basis for appellee's second claim of credit for a second payment of the $29,000 is that the United States authorized payments, out of Creek annuities which had not yet been paid, for the benefit of refugee Indians during the Civil War, Resolution of February 22, 1862, 12 Stat. 614; that the $29,000 here in question was so used; and that the use of the annuities for that purpose was ratified and confirmed by appellant by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790.

The Supreme Court's decision in *Seminole Nation* v. *United States*, 316 U.S. 286, 290-291, supports appellee's legal position, if in fact the $29,000 here in question has been shown to have been disbursed for the benefit of refugee Indians. In the *Seminole* case this court had found that the $61,563.42 in question had been diverted *and disbursed* by the Government.

While it is clear that payments were made by the United States for the benefit of refugee Indians, I do not think that there is substantial evidence in this case to support a finding that *the $29,000* in issue was in fact paid to refugee Indians. I note that the Indian Claims Commission did not so find. It found only that the United

States Congress had approved such payment for the benefit of refugee Indians,[2] "which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790)."

The Treaty of 1866 approved and confirmed *expenditures made* by the United States since the diversion of annuities for that purpose. The fact that other annuity money was diverted for payment to the refugees does not establish that the United States' obligation for this $29,000 was released.

The evidence in this case shows that $343,321.17 was disbursed by the United States, during the years 1862 to 1867 for the relief of refugee Indians, under the appropriation entitled "Fulfilling Treaties with Creeks." Appellee says that Creek treaties in force during that period provided for a total of $229,260 in annuities payable to the Creeks. This figure appears to have been taken from the total amounts appropriated under Creek treaties by Congress in the fiscal years 1862-1866.

Appellee argues that because the amount expended for the relief of refugee Indians exceeded the total of the United States' obligations for the period in question by more than $29,000, the $29,000 due under Article VI of the Treaty of 1856 is shown to have been expended for the refugee Indians. This does not follow at all. There may well have been other outstanding Creek treaty obligations which formed the basis for the 1862-1867 expenditures. Indeed there must have been, since the excess of expenditures over current treaty obligations was considerably more than $29,000.

Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856

[2] This approval was not specifically of the $29,000, but of all "annuities payable to the * * * Creeks * * * and which have not been paid." Resolution of February 22, 1862, 12 Stat. 614.

Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000.

For the foregoing reasons, I respectfully dissent.

[117]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Decided: February 18, 1959

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The Plaintiff, the Creek Nation of Indians, is a tribe of American Indians within the meaning of the Indian Claims Commission Act, and as such is authorized to bring this cause of action under Sec. 2 of said Act. This claim is not included in any suit pending in the Court of Claims or the Supreme Court of the United States, nor was it pending in the Court of Claims under any legislation in effect on the date of approval of said Indian Claims Commission Act (Pltf's Req. Find. No. 1 and Dft. Req. Find. No. 1)

2. Plaintiff asserts a claim in law under Clause (1), Sec. 2, Indian Claims Commission Act. The claim is in the nature of an action of debt asking payment for sums allegedly owing and unpaid and obligations unfulfilled, due plaintiff under Treaties of 1802, 1805, 1832, 1833, and 1856.

3. The relation of guardian and ward as between the plaintiff and the defendant has not been established by competent or relevant evidence.

[118] 4. Article II of the Treaty of June 16, 1802 between the Creek Nation and the United States, proclaimed January 11, 1803 (7 Stat. 68) provided in part as follows:

> The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars of the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged: ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States: the said debts, after the payment aforesaid, to become the right and property of the Creek Nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct: five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. * * * *

Article IV of said treaty provided:

> The contracting parties to these presents, do agree that this treaty shall become obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof.

This treaty became effective on January 11, 1803, the date of its proclamation by the President. Thereunder the United States was obligated by the above treaty stipu-

lation to pay said perpetual annuity of $3,000.00 per annum beginning with the year 1803 through the fiscal year 1902 (Cl. Ex. 1, pp. 131, 708), when this permanent annuity was funded under the Act of May 27, 1902 (32 [119] Stat. 249)—a period of 100 years, less the Civil War period of six years (fiscal years 1862 through 1867),* leaving a net obligation of the United States to pay said permanent annuity to the Creek Nation over a period of 94 years at $3,000.00 per annum, or a total obligation of $282,000.00, under the above Article II.

The total obligations of the United States under said Article II for which this claim is based are set forth as follows:

Permanent annuity of $3,000.00 per annum for 94 years	$282,000.00
Annuity to chiefs, $1,000.00 per annum for 10 years	10,000.00
In goods and merchandise, receipt of which was acknowledged	10,000.00
To satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States	10,000.00
To satisfy claims for property taken by individuals of the Creek Nation, from citizens of the United States subsequent to the Treaty of Colerain	5,000.00
	$317,000.00

The defendant agrees that the obligation of the United States under the provisions of the aforesaid treaty is the amount of $317,000.00 as hereinabove stated.

Plaintiff admits the payment and disbursement by the United States to the Creek Nation on said treaty obligation and in the amount of $254,690.25 (as itemized in its

* The Creek Nation has eliminated any claim in this case for annuity payments due from the United States during the Civil War period, or for the fiscal years 1862-1867, 6 years, this period being covered by separate petition in Docket No. 274 (R. 3).

Req. Find. No. 4) and claims a balance due under said treaty obligation in the amount of $62,309.75.

[120] The General Accounting Office report shows that unallocated payments and goods of the value stated were paid and forwarded to the Creek Indians within the years stated as follows:

Year	Value of Goods	Remarks
1803	$ 3,00 .00	Annuities for Creeks
1803	1,008.08	Goods for Creek Chiefs
1804	4,150.84	Annuities for Creeks
1804	1,100.07	Goods for Creek Chiefs
1805	4,000.24	Annuities for Creeks
1805	500.16	Goods for Creek Chiefs
1805	4,000.00	Annuity for year 1805
1806	6,000.50	Annuity for year 1806
1806	6,343.85	Annuity for year 1806
1807	1,000.08	Goods for Upper Creek Chiefs
1807	499.05	Goods for Lower Creek Chiefs
1807	6,025.06	Annuity for Upper Creeks
1807	5,999.39	Annuity for Lower Creeks
1808	7,646.46	Annuity for Upper Creeks
1808	8,250.45	Annuity for Lower Creeks
1808	501.38	Goods for Lower Creek Chiefs
1808	499.90	Goods for Upper Creek Chiefs
1809	500.41	Goods for Upper Creek Chiefs
1809	348.98	Goods for Lower Creek Chiefs
1809	7,300.40	Annuity for Upper Creeks
1809	7,749.64	Annuity for Lower Creeks
1809	508.51	Annuity for year 1809

These unallocated goods forwarded amount to $77,263.45 and consist of $71,305.34 in annuities and $5,958.11 to Chiefs for the period 1803-1809, inclusive (Dft. Ex. 142, p. 103)

These disbursements are disbursements which the General Accounting Office cannot definitely and clearly identify as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805.

In addition to the foregoing goods forwarded, which the report does not allocate to any treaty stipulation due

(Says General Accounting Office) to incompleteness of records, said report shows additional disbursements for the benefit of the Creek Indians for purposes stipulated [121] in various treaties with the Creeks, which the Accounting Office says cannot be identified as having been disbursed in fulfillment of any particular treaty and are, therefore, not allocated to any specific treaty as follows:

	1811	1815	1817	1818
Annuity, goods	$3,350.00	$4,300.00		
Annuity, cash				$6,517.00
Claims (depredations)			$2,000.00	5,801.00
Cash payments to Chiefs	200.00			

These disbursements amount to $22,198.00 and consist of $14,197.00 annuity disbursements, $7,801.00 claims and $200.00 payment to Chiefs. (Dft. Ex. 142, pp. 685-689)

5. Article III of the Treaty of November 14, 1805, between the Creek Nation and the United States, proclaimed June 2, 1806 (7 Stat. 96, 2 Kapp. 85), provided as follows:

> "it is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Ocmulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonally signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest. The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

Article V. of said treaty provided in part:

> "* * * and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Said treaty became effective on June 2, 1806, when proclaimed (2 Kapp. 85).

[122] The total obligation of the United States to the Creek Nation under said Article III was as follows:

$12,000.00 annually for 8 years in money, or goods, and implements of husbandry, at the option of the Creek Nation	$ 96,000.00
$11,000.00 annually for 10 succeeding years, to be paid in like manner	$110,000.00
Total obligation	$206,000.00

The report of the Accounting Office shows annual appropriations to fulfill the above obligation, but disbursements definitely allocated to the fulfillment of the obligations of this treaty are in the amount of $169,452.25.

The defendant admits the obligation under said treaty to be in the amount of $206,000.00 as above stated. The unallocated disbursements by defendant, as stated in the preceding finding, in the total amount of $99,461.45 is in excess of the amounts claimed by the plaintiffs as being due and unpaid under the obligations of both the Treaties of 1802 and 1805.

6. Under Article XIII of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366), it was provided that $3,000 should be expended, as the President might direct, for the term of twenty years for teaching plaintiffs' children. The total obligation of the United States to the Creek Nation under said Article XIII amounted to $60,000.00. This is agreed to by defendant.

Article 4 of a Treaty of January 4, 1845 between the Creek Nation and the United States (9 Stat. 821) provided for an additional annual annuity by the United States for the purpose of education of the children of plaintiff in the amount of $3,000.00 per year should be allowed for a term of twenty years and that the annuity of $3,000 per year provided in the Treaty of 1832 should [123] be continued until the termination of the educational annuity provided in said 1845 treaty.

Article 5 of the Treaty of August 7, 1856 between the United States and the Creek Nation (11 Stat. 699) amended and continued Article 4 of the Treaty of 1845 (and the Treaty of 1832) by providing for an annuity of $6,000 per annum for education for seven years.

The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's Ex. 185, 186) in fulfillment of the obligations of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

7. Article V of the Treaty of February 14, 1833 between the United States and the Creek Nation (7 Stat. 417) provided in part as follows:

> "As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagon-

maker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to [124] the interest and welfare of the Creek Indians: And the United States will also cause to be erected, as soon as conveniently can be done, four patent rail way mills, for grinding corn; and will immediately purchase for them twenty-four cross-cut saws. * * *"

Article IX of said treaty provided:

"This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

This treaty became binding upon the parties on April 12, 1834, when proclaimed (2 Kapp. 388).

Petitioner contends that the obligation of the United States under said treaty was for a period of 39 years (omitting the Civil War years) at $2,710.00 per annum or a total obligation of $105,690.00; and that the report of the General Accounting Office showed expenditures in fulfillment of said treaty obligation by the United States in the amount of $80,981.45 (items appearing in its Req. Find. No. 7) and that there is a balance due under said treaty obligation of $24,708.55 (Pltf. in its reply brief claims a credit of $4,696.00 was erroneously given defendant and that the balance due is $29,404.55, Reply Brief pp. 32, 33)

There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there

any evidence of any demand having been made by petitioner for services or equipment not supplied.

8. Article VI of the Treaty of August 7, 1856 between the United States and the Creek Nation (11 Stat. 699) provided in part as follows:

> "In consideration of the foregoing quit-claim, relin-
> [125] quishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent, per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * * *"

Plaintiff claims an obligation of defendant under the above provision to pay $10,000 as interest to the plaintiff for the years 1857 to 1861, both inclusive—a total of $50,000 upon which obligation the plaintiff contends the defendant still owes $29,000. (Pet. Req. Finding No. 8).

In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States. (Dft's Ex. 159, page 297)

The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166-170, 173).

The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).

9. The treaty of defendant with the Creek and Seminole Tribes of Indians of August 7, 1856 (11 Stat. 699) provided in Article V thereof that all claims and demands whatsoever which the Creek Nation might have against the United States, excepting only those continued as set out in said article, should be released and fully discharged. [126] Many of the claims asserted by the plaintiff herein are not among those specifically mentioned in said treaty provisions as being continued as liabilities of the defendant.

10. There is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged.

/s/ Edgar E. Witt
Chief Commissioner

/s/ Louis J. O'Marr
Associate Commissioner

/s/ W. M. Holt
Associate Commissioner

[127]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: Feb. 18, 1959

Appearances:

Mr. Paul M. Niebell
Attorney for Plaintiff

Mr. Keith Browne, with whom
was Mr. Assistant Attorney
General, Perry W. Morton,
Attorneys for Defendant

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The plaintiff in its original petition asserts that it was the owner of trust and other funds, which said trust and other funds were held in trust by the defendant and paid and administered for the use and benefit of plaintiff, and that it was provided by the treaties between plaintiff and defendant that said trust and other funds were to be managed and invested and otherwise disposed of by defendant for the benefit of plaintiff, said treaties being specifically referred to in later allegations of said petition.

However, in the several claims thereafter in the petition specifically set out, no one of said claims in the opinion of this Commission, is shown to involve trust funds.

[128] The first claim is for $87,309.75 and is described in detail in Sec. IV of plaintiff's petition and in Requested Finding No. 4 of plaintiff's requested findings of fact. Both descriptions of said claim state that same arose under Article II of the Treaty of June 16, 1802 (7 Stat. 68). In the petition it is alleged that defendant's total *obligation* under said treaty amounted to $320,000.00 and that defendant disbursed $232,690.25 only on said treaty obligation and therefore the amount of $87,309.75 is *due and owing* to plaintiff from defendant for defendant's *failure to fulfill said treaty obligation*. In the Requested Finding No. 4 plaintiff requests a finding that the total *obligations* of the United States under said Article II of said treaty amount to $317,000.00 on which the United States had only disbursed and accounted to the plaintiff for $254,690.25 and that defendant is *now due and owing to the Creek Nation a balance* of $62,309.75, for which the defendant has failed to account.

Both descriptions of said claim are for indebtedness claimed to have been created on the part of the defendant to the plaintiff by the provisions of the Treaty of June 16, 1802, and not for moneys it had received from or for the plaintiff, the management of which the defendant became trustee.

The next claim for which suit is brought is set out in Sec. V of plaintiff's petition. This claim is based on the provisions of Article III of the Treaty of November 14, 1805 between the Creek Nation and the United States (7 Stat. 96). The plaintiff alleges that said Article III created a total *obligation* on the part of the United States [129] to defendant in the amount of $196,000.00 on which the defendant disbursed $169,452.25 only on said treaty *obligation*, and therefore the amount of $26,547.75 *is due*

and owing to plaintiff for defendant's failure to fulfill said treaty obligation.

This claim is again described in plaintiff's Requested Finding No. 5 in which it is stated that the total obligation under said treaty was $206,000.00 and total disbursements shown by General Accounting Office to be only $169,452.75, although Congress has appropriated the full amount due. And the balance now due and owing by the defendant on said treaty obligation is in the amount of $36,547.75.

The next claim is described in Sec. VI of plaintiff's petition as arising under provisions of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366) which total obligation under said treaty is alleged to be $60,000.00 on which it is alleged the defendant disbursed $49,938.99 only on said treaty obligation and therefore the amount of $10,061.01 *is now due and owing.* This claim is again described in plaintiff's Finding No. 6 wherein the *total obligation* under said treaty is stated to be $60,000.00, the total disbursement of the defendant on said obligation as having been only $49,938.99, leaving a balance *now due and owing from the United States to the Creek Nation* in the amount of $10,061.01.

The next claim for which suit is brought is described in Sec. VII of plaintiff's petition as arising out of treaty between the United States and the Creek Nation on February 14, 1833 (7 Stat. 417). It is alleged that the total *obligation* of the United States to the plaintiff under the provisions of said treaty was $119,240.00, on which [130] the defendant disbursed only $74,290.45, and the defendant *is now due and owing* to the plaintiff $44,-949.55.

In petitioner's Finding No. 7 the total of said *obligation* under the above treaty is stated to have been $105,690.00, on which the defendant paid and disbursed to the Creek Nation in fulfillment thereof only the amount of $80,-

981.45 and that there is a balance now *due and owing* by the defendant to the plaintiff under said treaty obligation the amount of $24,708.45.

In plaintiff's reply brief (pp. 32, 33,) it is alleged that an error had been made in giving the defendant credit for $4,696.00 to which it was not entitled and that the total disbursement to which the defendant was entitled to credit was only $76,285.45 and that plaintiff's claim on said item is the amount of $29,404.55.

In Sec. VIII of the plaintiff's petition a provision of the Treaty of August 7, 1856 (11 Stat. 699) is alleged as creating an *obligation* on the part of defendant to *pay* annually an item of $10,000.00 as interest to plaintiff; that said interest became due and owing for the years 1857-61 inclusive in the total amount of $50,000.00 on which obligation the defendant disbursed only $21,000, although Congress appropirated the total of $50,000.00, and therefore the amount of $29,000.00 *is due and owing to plaintiff from defendant* because of defendant's *failure to fulfill said treaty obligation.*

This liability is also described in plaintiff's Requested Finding No. 8 in practically the same language as described in the original petition.

[131] The final prayer of the plaintiff in its original petition reads as follows:

> "WHEREFORE, plaintiff prays:
>
> 1. That plaintiff be awarded judgment against defendant for the total amounts of said unfulfilled treaty obligations, together with interest at five per centum per annum on said amounts to date."

In plaintiff's last Requested Finding No. 9 in recapitulation the plaintiff asks for this finding:

> "Therefore, there is due and owing to the Creek Nation from the United States the following unpaid

balance under the above treaty obligations of the United States."

Then follows an itemized statement of the several amounts previously asked for as due and owing aggregating with the added amounts stated in the reply brief in the total amount of $167,323.06.

In plaintiff's Request for Findings of Fact No. 2 the treaty between the Creek Nation and the United States of August 7, 1790 (7 Stat. 35) is quoted the provisions whereby the Creek Nation acknowledges itself to be under the protection of the United States and no other sovereign, etc. and it is requested that this treaty provision be found to have created thereafter a fiduciary relationship between the Creek Nation and the United States as that of guardian and Indian ward. Thereafter in plaintiff's brief (p. 11) in support of the above requested finding, the plaintiff alleges that the claim (meaning all of the claims in the present suit) is for an accounting brought against the United States, "*its guardian.*"

Statement is then made (Brief, p. 2) that the claims presented are "claims under treaty provisions as the General Accounting Report clearly shows were not fulfilled [132] by the United States, and as to which balances are shown therein *to be due and owing from the United States to the Creek Nation.*" Both parties make many and varying contentions as to the items of charge and credit involved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as a guardian

or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor.

As supporting its contention that the relationship is that of guardian and ward, the plaintiff relies on the language of the Treaty of 1790 which is quoted in findings of fact and also in the decisions of the Supreme Court in the Seminole case (316 U.S. 286, 295-297) and that of the *Sioux Tribe* v. *United States* (105 C. Cls. 725-802). The language of the Supreme Court case, upon which the plaintiff relies, is language in keeping with that of many other decisions of the Supreme Court and other courts to the effect that there is a duty upon the Government in its dealings with the Indian Tribes of a more exacting nature than with two entities that might be called on a par with each other; but there is nothing in the decision that indicates a change in the burden of proof in such matters [133] as are involved in the present law suit. The decision of the Supreme Court cited was rendered on *May 11, 1942*. Some of the funds involved in that case grew out of treaties and obligations of debt created thereby. Others were trust funds.

The language quoted by the plaintiff from that decision was with regard to a claim based on alleged liability for a trust fund, provided by Article VIII of a Treaty of 1856 (11 Stat. 699), which fund was to be invested and managed for the plaintiff by the Government. At a later date (Nov. 5, 1945) the Supreme Court held by refusing Writ of Certiorari that a mere indebtedness of the Government to an Indian Tribe was not a trust fund.

We refer to the case of the Chickasaw Indians against the United States (in which, by the way, Mr. Paul M. Niebell, who is counsel in this case, was counsel therein) reported in 103 C.Cls. 1-57, as to which the Supreme Court on November 5, 1945 denied certiorari as to the judgment on the merits. This case involves, among other claims, plain and simple treaty obligations of the United

States to the plaintiff Indians, as to which the plaintiff claimed nonpayment and non-fulfillment. As in the case at bar the evidence upon which the plaintiff relied for the nonfulfillment of the obligations, and its right to recover therefor, *was a failure of the defendant to prove compliance and fulfillment.* In many instances there was a showing of merchandise due and owing by the defendant to the plaintiff, and by the defendant, merely a memorandum of purchase for the plaintiff, *but no showing of actual* [134] *delivery to the plaintiff. There being no proof on the part of the plaintiff that it did not get the goods and value.* The plaintiff therein contended, as in the case at bar, that the burden was on defendant to prove delivery to plaintiff, or payment to plaintiff. A statement of the Court as to same is applicable to many of the situations in the case at bar; "for the years 1798, 1799, and 1800 goods of the annuity values were forwarded from the War Department Storehouse in Philadelphia for the Chickasaw Nation. It must be presumed *that they were received in due course.* (underscoring supplied) To require defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. *The burden is upon the plaintiff to prove its case.* While the jurisdictional act waives the lapse of time, it does not thereby shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff."

Other claims in the Chickasaw case were for deposits of Chickasaw money to other tribes. The Court says: "there is lack of proof that the deposits were erroneously made. The mere fact of deposit to other than a Chickasaw fund, without more, does not entitle plaintiff to recover • • •" "No judgment of recovery can be based on the showing made." (p. 42)

There were some items of claim allowed in the Chickasaw case, items in which the burden of proof was not involved. Offsets were allowed, however, which wiped [135] out the entire amount of the award. Petition for Certiorari was filed with the Supreme Court on the whole case. It was allowed only as to the offsets. We find, upon examining the petition for certiorari that it was stated that the basic question presented was "whether the regular equitable principles governing an accounting between the guardian and ward are to be applied to a case in which the Chickasaw Nation demands an accounting from the United States of moneys due it under treaties and agreements." Also, "whether the Indian ward has the burden of proving the items it excepts to in the guardian's account." The refusal of the Supreme Court to allow certiorari on the matters hereinabove specifically called to its attention is evidence that it approved the holdings of the Court of Claims in reference to such matters; and this, of course, leaves the law as applied to the "burden of proof" where it was found by the Court of Claims to be—that was on the plaintiff. This is therefore the law as to the burden of proof applicable to the claims in the instant case.

As the plaintiff, in support of its viewpoint as to the burden of proof also cites the case of *Sioux* v. *United States* (105 C. Cls. 725) wherein the court states that "The defendant is the trustee; it kept and has all the records and evidence and it has the burden of making the proper accounting," (p. 802), attention will be called to the fact that in that case the matter involved was the proceeds in the possession of defendant of land sold by the defendant, which money, of course, was a trust fund and the handling of same is governed by the rules applying to trustee and guardian. Such is not the situation [136] in the present case, but only involves the relationship of relationship of ordinary debtor and creditor.

The plaintiff relies solely on the language of the Treaty of 1790 (under which no claim asserted is based) as the basis for its claim that the relationship of guardian and ward existed between it and the defendant. One of the latest pronouncements with reference to the relationship between the Indian tribes and the United States is that of *Gila River Pima—Maricopa Indian Community* v. *United States* (Ct. Cls., 140 F. Supp. 766, 780)

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive Order, or statute under which the claim presented arises. It is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that the doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. (Citing *Creek Nation* v. *United States*, 318 U.S. 629, 642)

We also call attention to a discussion of the Court of Claims as to the relationship of guardian and ward as between Indian Tribes and the Government appearing in the decision of that Court in the case of *Sioux Tribe* vs. *United States*, 146 F. Supp. 299 (1956); also discussion of this question by this Commission in its opinion in the *Omaha Tribe, et al* vs. *United States*, 6 Ind. Cls. Com. 68, 73, 74.

[137] The plaintiff makes mention in its reply of the Chickasaw case (103 C.Cls. 1) and insists that the decision therein has no application to the present case, and in any event the holding of the Court of Claims in the *Sioux*

case, 105 C. Cls. 725, overrules the holdings in the *Chickasaw* case. The decision in the Sioux case, if it were different from that in the Chickasaw case, could not overrule the same because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari. However, the holding in the Sioux case is not on facts of the kind involved in the Chickasaw case, because claim in the Sioux case was based on the handling of funds received by the United States as the proceeds of the sale by it of lands belonging to the Sioux Tribe whereby said funds became trust funds and the principle of law applying to the handling of same by trustee or guardian applied.

The plaintiff makes the statement in its reply brief (p. 51) that if it "had filed suit under the Creek Treaties of 1790 and 1796, and under the Secret Article of the 1790 treaty, we would have had a somewhat similar case to that of the Chickasaws." We cannot follow such reasoning. The instant case seems to be on "all fours" with the claims we rely on in the Chickasaw case.

The *Menominee* case, reported at 102 C. Cls. 355, involved proceeds of sale of plaintiff's property, and that reported 118 C. Cls. 326 involved offsets asserted by it, and are not applicable to the case at bar.

[138] As to the monetary liability, if any, created by the obligation of the Government to furnish black-smith, wheelwright and equipment, as to which specific money obligations are not specified, the defendant contends that such obligations do not create a fixed monetary liability; and that to recover for a failure on the part of the defendant to comply with the treaty stipulations would require proof on the part of the plaintiff as to the pecuniary losses suffered by reason of the alleged failure. As to whether or not this contention is correct, or as to whether the basis for the sums claimed by the plaintiff as money

liability for the alleged failure on the part of the defendant is correct, it is not necessary for us to determine under our holding that plaintiff has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had.

Defendant contends that the claims are res judicata by reason of jurisdictional acts and cases cited. The defendant also claims that by provisions of the Treaty of August 7, 1856 plaintiff released many of the claims urged in this case. This Commission is inclined to the opinion that the defense of res judicata is not well taken but with reference to the effect of the release provisions of the Treaty of 1856, it is inclined to agree with defendant: however, in view of its decisions on the merits, it is not necessary for it to decide as to the plea of res judicata or as to the effect of release provisions of the Treaty of 1856. As to said release, however, the plaintiff practically admits its effectiveness as to all claims based on [139] the treaties of 1805 and 1832 when it says in its reply brief (p. 56), "As a legal matter this release would bar the claims under the Treaties of 1805 and 1832 as defendant contends." Certainly the claims of this suit are based on treaties, not on moral obligations and are definitely and unquestionably legal claims and are being so urged and urged only as legal claims.

In keeping with this opinion and findings of fact filed herein, this case will be dismissed.

s/ Edgar E. Witt
Chief Commissioner

Concurring:

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

THE CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. App. 64–74) is reported at 7 Ind. Cl. Comm. 117, 127. The opinion of the Court of Claims (Pet. App. 28–53) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961 (Pet. App. 28). The petition for a writ of certiorari was filed on May 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(e) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s(e).

TREATIES AND STATUTES INVOLVED

The pertinent portions of the five treaties between the Creek Nation and the United States upon which this suit is based are set forth in Petitioner's Appendix at pp. 23–27. The pertinent provisions of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70–70v, are set forth at pages 3 to 5 of the petition.[1]

QUESTION PRESENTED

Whether, in a suit by an Indian Tribe against the United States based on the government's alleged breach of its treaty obligations to make certain payments to the Tribe, the burden of proof is upon the government to show that it made the payments, rather than upon the Tribe to show that they had not been made.

STATEMENT

The petitioner, the Creek Nation, brought this action before the Indian Claims Commission to recover amounts allegedly due under five treaties between it and the United States executed between 1802 and 1856. Under the treaties, the government was obligated to make payments and to provide goods and services to petitioner.

To support its claim, petitioner relied principally upon a report which had been prepared by the Gen-

[1] Subsection (5) of Section 2 of the Act is shown as subsection (4) in the petition, and subsection (4) has been omitted. Subsection (4) gives the Commission jurisdiction over "claims arising from the taking by the United States whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."

eral Accounting Office for use in a prior suit brought by petitioner against the United States. This report listed all obligations assumed by the United States under all its treaties with the Creek Nation, and all payments made on such obligations. The General Accounting Office was unable, however, to attribute certain payments to specific treaties, and was also unable to state, in certain instances, that the amounts reported were all of the sums actually disbursed by the government in fulfillment of its treaty obligations.

The petitioner contended that under the five treaties involved in this case, the government had agreed to make payments and to provide goods and services to the Creek Nation aggregating approximately $739,000; but that the total payments actually credited in the General Accounting Office report to the particular treaties were only $576,000. The petitioner urged that it was entitled to the difference of $163,000. The government, on the other hand, contended that certain of the other payments, aggregating $160,000, although not specifically allocated to the five treaties, were in fact made in satisfaction of its obligations thereunder. It also introduced evidence that one alleged treaty deficit of $29,000 had in fact been paid. Fdgs. 4–8, Pet. 55–62.

The Indian Claims Commission found that "[t]here is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged" (Fdg. 10, Pet. 63), and dismissed the case. The Commission stated (Pet. 68–69):

> Both parties make many and varying contentions as to the items of charge and credit in-

> volved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as a guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor. [Emphasis by Commission.]

The Commission rejected the petitioner's contention that the treaty claims it was asserting in this case arose out of a relationship of guardian and ward, and it found that such relationship "has not been established by competent or relevant evidence" (Fdg. 3, Pet. 54). It stated (Pet. 71) that this case "only involves the relationship of ordinary debtor and creditor"; that under such a relationship one who alleges non-payment has the burden of proving it; and that the petitioner "has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had" (Pet. 74).

In a *per curiam* opinion the Court of Claims, "being in agreement with the disposition of the case made by the Indian Claims Commission," affirmed the judgment of dismissal (Pet. 28). Judges Littleton and Madden, dissenting, were of the view that "the relationship between the United States and an Indian Tribe is sufficiently similar to the relationship be-

tween a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties" (Pet. 33), and that the government had failed to sustain that burden.

ARGUMENT

Both the Indian Claims Commission and the Court of Claims held that where, in proceedings under the Indian Claims Commission Act, an Indian Tribe alleges that the United States has failed to pay in full its treaty obligations to the Tribe, the burden of proof is upon the Tribe to establish that claim, and not upon the United States to negative it, *i.e.*, to show affirmatively that it did make full payment. They both further held that in this case the Tribe had failed to prove that it had not been paid in full. These rulings are in accord with settled principles governing the determination of claims by Indian Tribes against the United States and are correct. There is no occasion for review by this Court.

1. "The Federal-Indian relationship has many times been said to resemble that of guardian and ward. However, in the absence of some specific language to that effect in the treaty, the legal obligations of a true guardianship do not prevail." *Skokomish Indian Tribe* v. *France,* 269 F. 2d 555, 560 (C.A. 9). The Court of Claims has similarly held that "[w]hether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends * * * upon the express provisions of the particular treaty * * * under which the claim presented arises." *Gila River*

Pima-Maricopa Indian Community v. *United States*, 140 F. Supp. 776, 780.

None of the five treaties involved in the instant case specifically made the petitioner tribe a ward of the government.[1] The court below has held that in such circumstances the burden of proof is on the Tribe to show non-payment (*The Chickasaw Nation of Indians* v. *United States*, 103 C. Cls. 1, 35, certiorari denied on this issue, but granted and judgment reversed on another issue, 326 U.S. 217, 219). In the instant case, the Indian Claims Commission and the Court of Claims applied that settled principle. The decision in *Sioux Tribe* v. *United States*, 105 C. Cls. 725, relied on by petitioner (Pet. 20) and by the dissenting judges below (Pet. 40–42), is not to the contrary. For, as the Indian Claims Commission pointed out (Pet. 73) the "claim in the Sioux case was based on the handling of funds received by the United States as the proceeds of the sale by it of lands belonging to the Sioux Tribe whereby said funds became trust funds and the principle of law applying to the handling of same by trustee or guardian applied." In the instant case, however, the claim was based on the alleged failure of the government to carry out its treaty obligations to make

[1] The petitioner includes (Pet. 23), as one of the treaties involved in this case, the Treaty of August 7, 1790, which, it alleges, created a guardian-ward relationship. While we dispute this contention, the short answer is that none of the claims asserted in this case arose under that treaty.

certain payments to the petitioner, and the Commission held that "no one of said claims * * * is shown to involve trust funds" (Pet. 65).

2. But, even if, contrary to the rulings below, the relationship between the petitioner and the United States under the five treaties involved were deemed to be that of ward and guardian, that of itself would not shift the burden to the United States to come forward and show payment. While the existence of such a relationship would create many fiduciary obligations on the part of the government toward its wards, it does not follow that, in the determination of claims of this character by the Indian Claims Commission, Congress intended to shift the usual burden of proof from the plaintiff to the defendant. The Indian Claims Commission Act is a special jurisdictional statute. If Congress, in providing these unusual remedies for the Indian Tribes, had also intended to make the government come forward with evidence of payment whenever noncompliance with treaty obligations was asserted, it presumably would have said so. In the absence of any such indication, it is fair to conclude that, although Congress conferred upon the Indian Tribes many benefits not available to other litigants, it still intended them to follow the normal requirement that, in order to recover, they must affirmatively prove all of the allegations necessary to establish their claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

THE CREEK NATION OF INDIANS,
Petitioner

v.

THE UNITED STATES,
Respondent

BRIEF FOR THE CREEK NATION, PETITIONER

THE CREEK NATION, Petitioner

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

THE CREEK NATION OF INDIANS,
Petitioner

v.

THE UNITED STATES,
Respondent

BRIEF FOR THE CREEK NATION, PETITIONER

OPINIONS BELOW

The opinion of the Indian Claims Commission is reported at 7 Ind. Cl. Comm. 117, 127 (R. 264-283). The opinion of the Court of Claims of March 1, 1961 is not yet reported (R. 292-315).

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961 (R. 292). The petition for a writ of certiorari was filed on May 29, 1961, and was granted on October 9, 1961 (R. 315).

The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1), and Section 20(c) of the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 1055; 25 U. S. C. Section 70s).

TREATIES AND STATUTES INVOLVED

The Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U. S. C. 70-70v), provides in pertinent part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> "All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.
>
> "In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the

Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * *."

* * * *

"Sec. 20(b). When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

"(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended."

The pertinent provisions of the treaties and statutes involved in the claims of petitioner are printed as a part of the Statement, or are set forth in the Appendix, pp. 78-84.

QUESTIONS PRESENTED

1. Whether the United States has an obligation to render a clear and accurate accounting of its dealings and the fulfillment of its treaty obligations owing to an Indian tribe in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race; or whether the United States is merely in the position of a debtor in its relationship under a treaty with an Indian tribe.

In other words, whether a fiduciary relationship exists between the United States and an Indian tribe (in this case the Creek Nation of Indians) requiring the United States to account strictly to the Indian tribe for the amounts disbursed by the United States in fulfillment of its treaty obligations; or whether the relationship is merely that of debtor-creditor.

2. Whether an Indian tribe can rely upon admissions contained in an accounting made by the accounting officers of the United States showing that the United States had failed to fulfill its treaty obligations to said tribe, and that balances are due and owing to the tribe under said treaty obligations of the United States.

3. Whether the United States has the burden of proving the credits it claims against amounts shown by its accounting to be due and owing an Indian tribe under treaty stipulations between the United States and an Indian tribe.

4. Whether the Court of Claims has discharged its duty as an appellate court under Section 20(b) of the Indian Claims Commission Act, when it, by a mere per

curiam statement, affirms the findings and opinion of the Indian Claims Commission in a case wherein appellant raises serious objections with respect to the failure of the Commission to find facts essential to the proper disposition of the claims presented, or found facts which were not supported by substantial evidence, or which were contrary to the record, when the above Act directs that the Court "shall" review the whole record and settle such questions.

5. Whether a denial of a writ of certiorari by this Court constitutes an approval of the decision of the lower court.

STATEMENT

The petitioner, the Creek Nation of Indians, brought an action before the Indian Claims Commission under the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U. S. C. §§ 70-70v), to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.

Petitioner (plaintiff-appellant below) alleged that the full amounts which the United States was obligated to pay to the Creek Nation as considerations due for cessions of Creek lands under these treaties were not in fact paid in full, and petitioner claimed the right to recover the unpaid balances (R. 1-6).

The United States answered denying that any sums were due, owing and unpaid under the treaties in question, "and that all of said funds were paid, administered and disposed of for the use and benefit of plaintiff, and in fulfillment of the stipulations of the treaties referred to by plaintiff" (R. 7-14). It also presented defenses of res judicata and release, which the Indian Claims Commission did not consider in deciding the case, because it held that petitioner had not proved its case (R. 273, 282).

The Creek Nation relied upon and introduced in evidence before the Indian Claims Commission pertinent extracts from a report of the Government's own General Accounting Office setting forth in detail all treaty payments made by the United States to the Creek Nation under the treaties in question, shown by the records which were maintained solely by the Government, and now in the custody of the General Accounting Office. In other words, the Creek Nation relied solely upon the accounting of disbursements under these treaties made by the Government's own accounting officers, and the admissions made therein showing that balances were due the Creek Nation under these treaties. The Government's accounting does not specifically show that the entire amounts due under the treaties in issue were paid to the Creek Nation in accordance with the stipulations of the United States in these treaties (R. 15-138, 295).

The claims under the several Creek treaties are set forth below.

Claims Under Treaties of 1802 and 1805

Petitioner originally presented independent claims under the Creek Treaties of 1802 and 1805. However, in deciding this case the Indian Claims Commission combined these claims, and we will follow this course in reviewing their treatment by the Commission, and Court of Claims.

Article II of the Treaty of June 16, 1802, between the Creek Nation and the United States, proclaimed January 11, 1803 (7 Stat. 68, 2 Kapp. 58) provided in part as follows:

> "The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and

> one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek Nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. • • •"

Article IV of said treaty provided:

> "The contracting parties to these presents, do agree that this treaty shall become obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof."

This treaty became effective on January 11, 1803, the date of its proclamation by the President (R. 266). Thereunder the United States was obligated to pay to the Creek Nation said perpetual annuity of $3,000.00 per annum beginning with the year 1803 through the fiscal year 1902 (R. 266), when this permanent annuity was funded under the Act of May 27, 1902 (c. 888, 32 Stat. 245, 249, 250) — a period of 100 years, less the Civil War period of six years (fiscal years 1862 through 1867).*

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* The Creek Nation eliminated from this case any claim for annuity payments due from the United States during the Civil War period, or for the fiscal years 1862-1867, 6 years, this period being covered by separate petition (R. 266).

The parties agreed that the total obligations of the United States under said Article II were as follows (R. 266-267):

Permanent annuity of $3,000.00 per annum for 94 years	$282,000.00
Annuity to chiefs, $1,000.00 per annum for 10 years	10,000.00
In goods and merchandise, receipt of which was acknowledged	10,000.00
To satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States	10,000.00
To satisfy claims for property taken by individuals of the Creek Nation from citizens of the United States subsequent to the Treaty of Colerain (1796)	5,000.00
Total	$317,000.00

The report of the Government's General Accounting Office shows that $254,690.25 only was disbursed by the United States to the Creek Nation in fulfillment of its treaty obligations under said Article II, as set forth below (R. 44-49, 119, 266-267, 274, 295-296):

Depredations	1806-1811		$ 3,290.25
Cash payments to Chiefs	1805, 1811		700.00
Cash annuity	1819-1836	$55,500.00	
	1837, 1839-1841, 1843, 1846-1861, 1868-1869	66,000.00	
	1844-1845	6,000.00	127,500.00
Cash payments to Creek Treasurer	1861, 1868-1898		99,000.00
Support of Creek Children at Choctaw Academy, with consent of Creek Chiefs	1831		2,200.00
Disbursed for benefit of Creek Nation, 4 years at $3,000.00	1899-1902		12,000.00
Goods and merchandise distributed at treaty council and receipted for in treaty	1802		10,000.00
	Total disbursed		$254,690.25

The record thus showed that the United States failed to account to the Creek Nation for the balance due under said Article II, and the Creek Nation limited its claim to the amount of $62,309.75 which the accounting report showed was due and owing from the United States to the Creek Nation under said treaty obligations of the United States.

On this record the Indian Claims Commission made the following finding of fact (R. 267):

> "Plaintiff admits the payment and disbursement by the United States to the Creek Nation on said treaty obligation and in the amount of $254,690.25 (as itemized in its Req. Find. No. 4) and claims a balance due under said treaty obligation in the amount of $62,309.75."

Petitioner challenged the sufficiency of this finding on appeal to the Court of Claims (R. 284, 286), because it merely stated petitioner's claim without determining whether or not the record supported the claim.

Article III of the Treaty of November 14, 1805, between the Creek Nation and the United States, proclaimed June 2, 1806 (7 Stat. 96, 2 Kapp. 85), provided as follows:

> "It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Oemulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonally signified from time to time, though the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest. The first payment is to be made as soon

as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

Article V of said treaty provided in part:

"• • • and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Said treaty became effective on June 2, 1806, when proclaimed (2 Kapp. 85; R. 269).

The parties agreed that the total obligations of the United States under said Article III were as follows (R. 269):

$12,000.00 annually for 8 years in money, or goods, and implements of husbandry, at the option of the Creek Nation	$ 96,000.00
$11,000.00 annually for 10 succeeding years, to be paid in like manner	110,000.00
Total	$206,000.00

The report of the Government's General Accounting Office shows that $169,452.25 only was disbursed by the United States to the Creek Nation in fulfillment of its treaty obligations under said Article III, as set forth below (R. 51-52):

Cash annuities	1811, 1815, 1817-1823	$128,667.45
Annuities in goods	1811, 1815	40,784.80
	Total disbursements	$169,452.25

The United States thus failed to account to the Creek Nation for the balance due under said Article III, and the Creek Nation limited its claim to the amount of $36,547.75, which the Government's accounting report showed was due and owing from the United States to the Creek Nation under said treaty obligations of the United States.

On this record the Indian Claims Commission found that (R. 269):

> "The report of the Accounting Office shows annual appropriations to fulfill the above obligation, but disbursements definitely allocated to the fulfillment of the obligations of this treaty are in the amount of $169,452.25."

Although the Commission did not so find, it is obvious that the amount due and owing to petitioner under said Article III was admittedly the difference between the total treaty obligation of the United States, or $206,000.00, and the total disbursements of the United States thereunder, or $169,452.25, leaving the balance of $36,547.75 due the Creek Nation under this treaty provision.

The total amount claimed by petitioner under the Treaties of 1802 and 1805 was $98,857.50 (R. 267, 269, 274-275, 295-296).

In an endeavor to overcome the above balance of $98,857.50 shown by its accounting report to be due the Creek Nation under the Treaties of 1802 and 1805, the United States took out of context certain unallocated expenditures for the years 1803 through 1809, totaling $77,263.45, for goods purchased and forwarded from Philadelphia for Creek Indians, which the Government's own accounting report sets up as possible disbursements in fulfillment of an earlier Treaty of August 7, 1790 (7 Stat. 35, 2 Kapp. 25), between the Creek Nation and the United States, *which was not in issue*, and which expenditures the accounting report did not and could not specifically allocate to the Treaties of 1802 and 1805 in issue (R. 23-24).

The United States had assumed obligations to the Creek Nation under the Treaty of August 7, 1790, proclaimed August 13, 1790 (7 Stat. 35, 2 Kapp. 25), which were as follows:

> "Article II. The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do

acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whosoever; * *

* * * *

"Article IV. * * it is hereby agreed, in addition to the considerations heretofore made for the said land, that the United States will cause certain valuable Indian goods now in the state of Georgia, to be delivered to the said Creek nation; and the said United States will also cause the sum of one thousand five hundred dollars to be paid annually to the said Creek nation. * *

* * * *

"Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned them by the Creeks for cultivation for themselves and their successors in office; but they shall be precluded exercising any kind of traffic.

* * * *

"Article XIV. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President of the United States, with the advice and consent of the Senate of the United States."

This treaty became effective when proclaimed on August 13, 1790. (2 Kapp. 25).

Furthermore, the United States assumed other obligations under Secret Articles of said Treaty of August 7, 1790, and thereunder obligated itself to pay to each of

the 6 medal chiefs of the Creek Nation $100.00 annually, and to the Creek Chief, Alexander McGillivray, for his services as the agent of the United States, $1,200.00 annually, during their lifetimes (Appendix p.8c).

So the total definite obligations of the United States to the Creek Nation under the Treaty of 1790, and the secret article thereof, amounted to $3,700.00 annually (R. 195-199); and under Article XII the United States further agreed to furnish the Creek Nation with domestic animals and implements of husbandry without limitation as to the amount for such disbursements.

The General Accounting Office report completely overlooked the obligations of the United States under the secret article of the Treaty of 1790, and accounted only for the perpetual annuity of $1,500.00. However, it did not begin to account regularly for the $1,500.00 permanent annuity until the year 1811 (R. 23-24, 36). In endeavoring to explain its failure to account for this permanent annuity during the period 1790 through 1810, the General Accounting Office report stated (R. 23-24):

> "In connection with the annuities due the Creek Nation of Indians under the aforesaid Treaty of August 7, 1790, it may be stated that while a careful search of the records of the General Accounting Office failed to disclose the amounts disbursed in the purchase of annuity goods for the Creek Indians during the years 1790 to 1809, said search did disclose that some annuity goods were furnished said Indians during said period. An examination of the ledgers and journals of the office of the Accountant for the War Department, the records of the storekeeper at Philadelphia (now on file in the General Accounting Office), and various records found with the old miscellaneous papers on file in the Office of Indian Affairs, indicates that goods valued at $1,500.11 were shipped from Philadelphia to the Creek country, on May 20, 1797, and that goods valued at $1,500 and $1,499.02 were actually delivered to the Creek Nation of Indians during the years 1798 and 1799, respectively. Said

examination also discloses that goods of the following values were forwarded from Philadelphia for the Creek Indians during the following years:

Year	Value of goods	Remarks
1800	$1,500.34	Annuity for year 1800
1803	3,000.00	Annuity for Creeks
1803	1,008.08	Goods for Creek chiefs
1804	4,159.84	Annuities for Creeks
1804	1,100.07	Goods for Creek chiefs
1805	4,000.24	Annuities for Creeks
1805	500.16	Goods for Creek chiefs
1805	4,000.00	Annuity for year 1805
1806	6,000.50	Annuity for year 1806
1806	6,673.85	Annuity for year 1806
1807	1,000.08	Goods for Upper Creek chiefs
1807	499.05	Goods for Lower Creek chiefs
1807	6,025.06	Annuity for Upper Creeks
1807	5,999.39	Annuity for Lower Creeks
1808	7,646.46	Annuity for Upper Creeks
1808	8,250.45	Annuity for Lower Creeks
1808	501.38	Goods for Lower Creek chiefs
1808	499.90	Goods for Upper Creek chiefs
1809	500.41	Goods for Upper Creek chiefs
1809	348.98	Goods for Lower Creek chiefs
1809	7,300.40	Annuity for Upper Creeks
1809	7,749.64	Annuity for Lower Creeks
1809	508.51	Annuity for year 1809

Said examination also discloses that moneys were advanced to disbursing officers for payment of salaries of interpreters for the Upper and Lower Creeks. During the years 1790 to 1809, various amounts were advanced to disbursing officers for annuities, but due to the fact that in most instances the names of the tribes for which the annuities were intended are not set out, it is impossible to state what portion, if any, of the amounts set out in the foregoing tabulation were in fulfillment of the aforesaid Treaty of August 7, 1790. It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty."

In addition to the above disbursements under the Treaty of 1790, and in search of further credits against the balance of $98,857.50 due the Creek Nation under the Treaties of 1802 and 1805, the United States also injected into the case certain disbursements, totaling $22,198.00, which the General Accounting Office report stated *it could not identify with any specific Creek treaty.* These disbursements are set forth as follows (R. 122, 127-128, 296):

	1811	1815	1817	1818
Annuity, goods	$3,350.00	$4,300.00		
Annuity, cash				$6,547.00
Claims (depredations)			$2,000.00	5,801.00
Cash payments to Chiefs	200.00			

The United States, nevertheless claimed these disbursements as credits against the balances shown in the General Accounting Office report to be due the Creek Nation under the Treaties of 1802 and 1805, *without identifying them with these treaties* (R. 122, 296).

The United States contended before the Commission that because the petitioner did not show that any of the total amount of the credits claimed by the Government (the $77,263.45 of the unallocated expenditures set forth by the General Accounting Office Report as possible disbursements under the Treaty of 1790 not in issue, and the $22,198.00 unidentified disbursements), or $99,461.45, was *not* paid in satisfaction of the obligations of the United States under Treaties of 1802 and 1805, the Government was entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeded the $98,857.50 claimed by petitioner to be the balance due under the Treaties of 1802 and 1805, so as to defeat petitioner's recovery under these two treaties (R. 296).

The Indian Claims Commission adopted the Government's position and determined that nothing was due to petitioner under the Treaties of 1802 and 1805 (R. 267-

268, 296). In doing so the Commission found that the Creek Nation was a tribe of American Indians within the meaning of the Indian Claims Commission Act, and was authorized to bring this cause of action under Section 2 of said Act; that the claim was in the nature of an action of debt, asking payment for sums allegedly owing and unpaid and obligations unfulfilled, and due petitioner under the treaties in question; and that the relation of guardian and ward as between the plaintiff and the defendant had not been established by competent or relevant evidence (R. 264-265). The Commission further applied the whole amount of $77,263.45 as possible disbursements under the Treaty of 1790 not in issue, without considering the obligations of the United States to the Creek Nation under said Treaty of 1790, and the secret article thereof, and also the $22,198.00 which the General Accounting Office could not identify with any specific Creek treaty, against the balance due under the Treaties of 1802 and 1805, and found and held that petitioner had not proven that any amounts were due the Creek Nation under said treaties (R. 267-269, 273, 277, 283).

Let us point out to the Court that in charging the entire amount of $77,263.45 disbursed for goods purchased at Philadelphia for Creek Indians during the period 1800-1809, against the balance due the Creek Nation under the Treaties of 1802 and 1805, the Commission assumed that these goods were actually received by the Creek Nation. However, the record shows that such shipments were not made directly to the Creek Agency, but were shipped to the United States Factor at Savannah, and held there for transportation overland by wagon to the Creek Agency on the Flint River, when requested by the Indian Agent (R. 215-220, 222). The Government's accounting report shows that only "goods valued at $1,500 and $1,499.02 were actually delivered to the Creek Nation of Indians during the years 1798 and 1799, respectively." (R. 23).

The Commission in doing so relied largely on a decision of the Court of Claims supporting the Government's position in *Chickasaw Nation* v. *United States* (1945), 103 C. Cls. 1, certiorari granted but limited to the question of specific designation of offsets, and judgment reversed, 326 U. S. 217. In relying upon this case rather than upon more recent decisions of the Court of Claims which overrule it, the Commission stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in Chickasaw] is evidence that it approved the holdings of the Court of Claims in reference to such matters." (7 Ind. Cl. Comm. at 135; R. 278-280). The Commission further stated that the decision of the Court of Claims in Sioux Tribe of Indians v. United States (1946), 105 C. Cls. 725, "could not overrule the same [Chickasaw case] because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari." (R. 281). We assigned this holding as error because this Court has made it clear in many instances that no such inference is to be drawn from its denial of certiorari in any case (R. 290).

The main issues in this case are thus presented.

Petitioner contended that a fiduciary relationship existed between the United States and the Creek Nation, an Indian tribe, and that the Government had the burden of presenting an accurate accounting of its payments to petitioner pursuant to the treaties in question. Petitioner maintained, therefore, that the Government was not entitled to credit for any amounts not specifically allocated on its books to the fulfillment of these treaties; and that the Government as the fiduciary had the clear burden of proving the credits it claimed against the balances its own accounting showed were due and owing petitioner under said treaties (R. 277-281).

Petitioner further contended that the many decisions of this Court have established that the fiduciary relationship existing between the United States and the Indian tribes is sufficiently similar to the relationship between a guardian and its ward as to impose upon the United States the burden of accounting clearly for the disbursements made in fulfillment of its treaty obligations to an Indian tribe (R. 277-278); that before the respondent was entitled to credit against the amounts claimed by petitioner under the Treaties of 1802 and 1805, it must prove affirmatively that the credits claimed were payments in fulfillment of the 1802 and 1805 Treaties, and were not disbursements under the earlier Treaty of 1790, and the secret article thereof.

Claim Under Article XIII, Treaty of March 24, 1832

Article XIII of the Treaty of March 24, 1832, between the United States and the Creek Nation, proclaimed April 4, 1832 (7 Stat. 366, 2 Kapp. 341), provided in part as follows:

> "• • • Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children.• • • "

Article XV of said treaty further provided:

> "This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States."

This treaty became obligatory upon the parties on April 4, 1832, when proclaimed (2 Kapp. 341; R. 269).

The parties agreed that the total obligation of the United States to the Creek Nation under said Article XIII, was $60,000.00 (R. 270).

The Report of the General Accounting Office shows that the United States disbursed $49,938.99 only in fulfillment of this treaty obligation to the Creek Nation under said Article XIII, as set forth below (R. 59-65):

Education:			
Support of Creek Children at Choctaw Academy	1832-1836, 1838	$10,934.48	
	1837-1843, 1845, 1849-1850	16,683.12	$27,617.60
Pay of superintendents and teachers	1842-1846, 1848, 1850-1851		2,593.37
Furniture and equipment	1842, 1846, 1850-1851		580.34
Pay of miscellaneous employees	1846-1848, 1850-1851		464.40
Provisions	1846, 1850-1851		2,511.15
Board and tuition	1846-1848, 1850-1851		7,998.48
Medical attention	1846-1848, 1850		105.12
Support of schools	1846-1847		3.40
Transportation of pupils	1848		365.00
Clothing	1850-1851		797.68
Transportation of supplies	1850-1851		1,081.93
Erection and repair of school buildings	1850-1851		4,336.71
Livestock	1850-1851		541.50
School farm	1850-1851		908.07
Fuel and light	1851		19.24
Feed and care of livestock	1851		15.00
	Total disbursements		$49,938.99

The United States failed to account to the Creek Nation for the balance due under said treaty obligation in the amount of $10,061.01, which petitioner claimed as being due and owing to it from the United States under this treaty obligation.

Although petitioner asserted a claim under Article XIII of the Treaty of March 24, 1832 only (R. 4), and issue was joined on this treaty obligation (R. 8), yet, at the request of respondent the Commission injected into its Finding 6 facts relating to an obligation of the United States incurred under Article 4 of the Treaty of January 4, 1845, between the Creek Nation and the United States (9 Stat. 821; 2 Kapp. 550), not a part of peti-

tioner's claim, and not material to it (R. 270, 275). We assigned this action of the Commission as error (R. 286-287).

The respondent admitted that its total obligation under this 1832 Treaty provision was $60,000.00, as the Commission found (R. 270), and the Commission further found that the disbursements under Article XIII of the Treaty of 1832, which began in 1832 and ended in 1851, totaled $49,938.99, as shown by the General Accounting Office Report (R. 59-64). However, the Commission simply made the following finding with respect to petitioner's claim under the 1832 Treaty (R. 270):

> "The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's. Ex. 185, 186) in fulfillment of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845."

The Commission thus completely failed to find whether or not the obligation of the United States under Article XIII of the Treaty of 1832 had been fulfilled. Petitioner assigned this failure as error (R. 286), because this was an essential fact necessary to the proper disposition of the claim asserted by petitioner; and that a finding merely stating the contentions of the parties, without finding which of the contentions was correct, was a failure on the part of the Commission to make an essential and material finding, and was error (Seminole Nation v. United States (1942), 316 U. S. 286, 300; Seminole Nation v. United States, (1942) 316 U.S. 310, 315-316; Snake or Piute Indians v. United States (1953), 125 C. Cls. 241, 255).

Claim Under Treaty of 1833

Article V of the Treaty of February 14, 1833, between the United States and the Creek Nation, proclaimed April 12, 1834 (7 Stat. 417; 2 Kapp. 388), provided in part as follows:

> "As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: • • •"

Article IX of said treaty provided:

> "This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

This treaty became binding upon the parties on April 12, 1834, when proclaimed (2 Kapp. 388; R. 271).

The amount to be disbursed annually for education was definitely fixed in the treaty at $1,000.00, but the amount to be disbursed annually for blacksmiths, etc. was not definitely fixed in the treaty. However, Congress made annual appropriations definitely fixing the amount of this treaty provision for blacksmiths, etc. at $1,710.00 over a

long period of time (R. 135-136). The General Accounting Office Report shows that payments under these treaty obligations began in the year 1834 (R. 75). So the date of beginning of these treaty obligations is definitely fixed by the action of the United States. Specific annual appropriations to fulfill these treaty obligations, from 1837 to 1878, were made by Congress, generally in the amount of $2,710.00—$1,710.00 for blacksmiths, etc., and $1,000 for education (Act of July 7, 1838, c.clxxxvi, 5 Stat. 299; R. 135-136). The Act of June 17, 1844 c.cviii, 5 Stat. 704, 706, provided:

> "For blacksmith and assistant, and use of shop and tools, during the pleasure of the President, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, eight hundred and forty dollars:
>
> "For iron and steel, two hundred and seventy dollars;
>
> "For wagonmaker, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, six hundred dollars;
>
> • • • •
>
> "For education, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, one thousand dollars;"

And Article V of the Creek Treaty of August 7, 1856 (11 Stat. 699; 2 Kapp. 756), continued these 1833 treaty obligations in the definite amount of $2,710.00 annually, in the following language:

> "• • • one thousand dollars per annum during the pleasure of the President for the same object [education], under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagonmaker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; • • •"

The General Accounting Office report shows that the United States continued this annual treaty obligation through the year 1878 (R. 136). So the respondent's own records show that the payments on the 1833 Creek treaty obligations began in 1834 and continued through the fiscal year 1878 (R. 75-88). The United States thus acknowledged its obligation to the Creek Nation under this treaty provision in the amount of $2,710.00 annually, or $1,710.00 for blacksmiths, etc., and $1,000 for education, over the period from 1834 through 1878, or for a period of 45 years, less the Civil War period of six years (fiscal years 1862 through 1867), leaving a net obligation of the United States to pay said annuity to the Creek Nation over a period of 39 years at $2,710.00 per annum, or a total obligation of $105,690.00.

The report of respondent's own General Accounting Office shows that $76,285.45 only was disbursed by the United States to the Creek Nation to fulfill the obligation of the United States under this treaty provision, as set forth below (R. 73):

Pay of blacksmith	1834, 1836, 1844-1846	$ 2,234.32
Pay of striker	1834-1836, 1844-1845	911.72
Pay of blacksmith and striker	1838-1841, 1843, 1845-1860	17,890.71
Iron, etc., for blacksmith shops	1835-1839, 1841, 1843-1845, 1847-1849, 1851-1853, 1855-1860	7,266.53
Pay of wagonmaker	1834-1837, 1839-1843, 1857, 1859-1860	4,702.33
Material for mechanical shop	1836	6.00
Erection of shops	1839	2,000.00
Cash payments to Creek Treasurer	1861, 1868-1875, 1877-1878	20,460.00
Education:		
Pay of superintendents and teachers	1837-1841, 1843-1846 1850, 1853	7,278.41
Support of Creek children at Choctaw Academy	1844-1845	1,658.69
Furniture and Equipment	1840-1841, 1846, 1850	162.28

Pay of miscellaneous employees	1850, 1853	237.56
Medical attention	1850	9.24
Provisions	1850	302.13
Clothing	1850, 1853	801.68
Erection and repair of school buildings	1844, 1850, 1853, 1868	2,059.26
Board and tuition	1851-1852, 1855-1860	8,171.31
Transportation of supplies	1853	5.36
Fuel and light	1853	12.60
Traveling expenses of school officials, etc.	1844-1853	81.75
Manual training supplies	1853	33.57
	Total disbursements	$76,285.45

The United States failed to account to the Creek Nation for the balance thus shown by its own accounting to be due under said treaty obligation in the amount of $29,404.55, which petitioner claimed as being due and owing from the United States to the Creek Nation (R. 270-271).

The Commission made the following findings relative to petitioner's claim (R. 271-272):

> "Petitioner contends that the obligation of the United States under said treaty was for a period of 39 years (omitting the Civil War years) at $2,710.00 per annum or a total obligation of $105,690.00; and that the report of the General Accounting Office showed expenditures in fulfillment of said treaty obligation by the United States in the amount of $80,981.45 (items appearing in its Req. Find. No. 7) and that there is a balance due under said treaty obligation of $24,708.55 (Pltf. in its reply brief claims a credit of $4,696.00 was erroneously given defendant and that the balance due is $29,404.55, Reply Brief pp. 32, 33).
>
> "There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there any evidence of any demand having been made by petitioner for services or equipment not supplied."

Petitioner on appeal assigned this portion of the Commission's Finding 7 as error (R. 287). The petitioner contended on appeal that the finding in the first paragraph above quoted is wholly incomplete, and therein the Commission failed to find the essential fact—whether or not the total obligation of the United States to the Creek Nation under Article V of the Creek Treaty of February 14, 1833 (7 Stat. 417, 2 Kapp. 388), had been fulfilled; that such a finding, which the Commission failed to make, is essential to the final disposition of this claim; and that a mere finding of what the petitioner contended, without a further finding of whether petitioner's contention was right or wrong meant nothing to the ultimate decision of the case.

Petitioner further contended that it was unnecessary for the ward to prove a demand upon its guardian, the United States, for the service and equipment not supplied, before it was entitled to recover the amount shown by the Government's own accounting report to be due and owing to petitioner under the above treaty obligation of the United States; and that the United States was obligated to fulfill its treaty obligation without a demand from its ward that it do so.

Claim Under the Treaty of 1856

Article VI of the Treaty of August 7, 1856, between the United States and the Creek Nation ratified August 16, 1856 and proclaimed August 28, 1856 (11 Stat. 699, 2 Kapp. 756), provided in part as follows:

> "In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe

> stocks, paying an interest of at least five per cent per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * * *"

Article XXVI of this treaty provided in part:

> "This convention * * * shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States."

This treaty thus became effective on August 7, 1856, when proclaimed by the President on August 28, 1856 (2 Kapp. 756).

The Government's accounting report shows that although Congress annually appropriated the $10,000.00 interest due on said $200,000 fund from the fiscal years 1857 through 1861, both inclusive, or for five years, a total of $50,000.00, yet the United States disbursed $21,000.00 only during said period under this treaty obligation (R. 103, 137). This accounting report thus shows that the United States failed to account to petitioner for the balance due under said treaty obligation in the amount of $29,000.00, which petitioner claimed as due and owing to it from the United States.

In its Finding 8 the Commission stated (R. 272):

> "Plaintiff claims an obligation of defendant under the above provision to pay $10,000 as interest to the plaintiff for the years 1857 to 1861, both inclusive—a total of $50,000 upon which obligation the plaintiff contends the defendant still owes $29,000. (Pet. Req. Finding No. 8)."

On appeal petitioner assigned this part of said finding as error in that the Commission failed to find whether or not the United States had fulfilled its treaty obligation to the Creek Nation in the amount claimed by petitioner; and instead merely recited the petitioner's claim, without finding whether or not petitioner's claim for $29,000.00 was right or wrong. (R. 287-288).

Petitioner further assigned as error that part of Finding 8 which stated (R. 272):

> "The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166-170, 173).
>
> "The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790)."

Petitioner on appeal challenged the above findings on the ground that they were immaterial and not supported by substantial evidence (R. 287-288); and contended that there was no evidence in the record showing that the $29,000 claimed was ever paid to the Creek Nation either by the Confederate States of America, or by the United States for the relief of refugee Indians in Kansas during the Civil War; that the record showed that this amount was due and owing by the United States to the Creek Nation under this treaty obligation before the Civil War began; and that the United States had simply failed to pay it regularly and faithfully for the purposes of education among the Creeks, as provided by the treaty.

The petitioner further contended that soon after the beginning of the Civil War the Creek Nation became divided in its sympathies, and formed two independent parties, and that from one-half to three-fourths of the Creeks fled to Kansas where they remained as refugees during the entire period of the War; and that any payment made by the Confederate States to the southern portion of the Creek Nation would not be payment to the Creek Nation, and would not satisfy the obligation of the United States to the Creek Nation, under said Treaty of 1856. And further, that the record did not show that said $29,000 was actually diverted and paid for the relief of refugee Indians in Kansas, and released by the provi-

sions of Article XI of the Treaty of June 14, 1866 (14 Stat. 785, 2 Kapp. 931; Appendix p. 44).

Petitioner further challenged on appeal the following ultimate finding of the Commission, as not being supported by the substantial evidence in the record (R. 273, 288):

> "There is not suff. evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged."

Petitioner had contended that the admissions in the Government's own accounting report showing that the balances claimed were due the Creek Nation under the treaties in question, were sufficient proof of the validity of the claims herein presented; and that the burden was upon the respondent to prove any credits it claimed against the balances shown by its accounting to be due and owing to petitioner under said treaties.

From the findings and holdings of the Commission dismissing the several claims set forth in petitioner's petition, the Creek Nation appealed to the Court of Claims under Section 20(b) of the Indian Claims Commission Act (R. 284-291). After full argument, the majority of the Court of Claims (3 Judges concurring), on March 1, 1961, merely by a per curiam statement, affirmed the findings and holdings of the Commission, without analyzing and reviewing the issues raised on appeal (R. 292).

Judge Littleton, the Senior Judge of the Court (now retired), who was joined by Judge Madden, wrote a dissenting opinion, the only opinion of the Court of Claims in this case, analyzing the findings and holdings of the Commission, and pointing out the errors of fact and law made by the Commission, and upholding the claims of petitioner in the instances set forth in the dissenting opinion (R. 292-315).

The dissenting opinion pointed out (R. 292-294):

> "This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission. While the instant suit was not brought strictly as a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. In the *Iowa Tribe of the Iowa Reservations in Kansas and Nebraska, et cetera* case, Docket No. 70, decided June 19, 1952, 2 Ind. Cl. Comm. 167, 176, the Commission stated that:
>
> > 'In its dealings with the Tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations.'
>
> The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed

the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. • • •

• • • •

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail."

The dissenting opinion then reviewed the decisions of this Court and those of the Court of Claims holding that a fiduciary relationship does exist between an Indian tribe and the United States; that this relationship is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of accounting clearly for amounts disbursed in fulfillment of its Indian treaties; that the relationship is not one of debtor-creditor, or of parties on an equal footing dealing at arms' length with one another; that the United States has the burden of proving affirmatively the credits

its claims against the balances shown by its own accounting to be due the Indian tribe; and that the denial of a writ of certiorari by this Court has no bearing on the merits of the claim presented in the petition for a writ of certiorari.

The dissenting opinion then analyzes the issues relating to the claims of petitioner under the several treaties in question, applying the law thereto in the light of the decisions reviewed.

With respect to the petitioner's claim for the unpaid balance of $98,857.50 under the Treaties of 1802 and 1805, the dissenting opinion pointed out that some of the unallocated amount of $99,461.45, which was credited against the $98,857.50 claimed, could be attributed to disbursements under the Treaty of 1790, for it is clear from the face of that treaty that there was an obligation of the United States of at least $1,500.00 a year due petitioner; that for the years 1790 through 1797, and 1800 through 1809, a total of 18 years, the Government's records do not specifically show payment of this $1,500 annuity, and that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 treaty obligation; and, therefore, at most $72,461.45 of the unallocated amount of $99,461.45, could properly be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805, leaving $26,396.05 which is not shown to have been paid under the 1802 and 1805 treaty balances (R. 306-308). The dissenting opinion then states (R. 307):

> "In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allow-

able to the Government against its 1802 and 1805 treaty obligations, given the state of its records."

The dissent did not take into consideration the further amounts paid by the United States under the secret article of the Treaty of 1790, which petitioner also believes should have been considered.

With respect to the balance of $10,061.01 claimed to be due petitioner under Article XIII of the Treaty of March 24, 1832, the dissenting opinion pointed out that the Indian Claims Commission did not find any additional credits due the Government on this obligation, and that the Commission failed to make any finding as to whether or not the Government's obligation under the 1832 Treaty was fulfilled (R. 308); and further stated (R. 308):

> "I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its fact, the Commission's 'finding' is merely a restatement of the Government's contention, and not a finding at all.
>
> "The Commission's 'ultimate' finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final determination and remand the case so that such findings may be made. Snake or Piute Indians v. United States, 125 Ct. Cl. 241, 255."

With respect to the balance of $29,404.55 claimed to be due petitioner under Article V of the Treaty of 1833 the dissenting opinion pointed out that the United States did not claim credit for more than the $76,285.45 which its records show it had paid on this treaty obligation ($2,710 per year for 39 years, or a total of $105,690.00), but took the position that the size of the obligation under the 1833

treaty was not adequately established; and further stated (R. 309-310):

> "The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had 'not proven the alleged failures of the appellee to fulfill its obligations * * *'. 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination."

With respect to the balance of $29,000 admittedly due petitioner as interest at 5 per cent per annum on the $200,000 trust fund, during the period of the fiscal years 1857 through 1861, which the Treaty of 1856 required the United States to apply annually for education of the Creeks, the Government before the Commission and Court of Claims had contended (1) that under Article XLI of its Treaty of 1861 with the Creek Nation the Confederate States agreed to pay the $29,000.00 and did so on or about January 28, 1862, and that such payment discharged the obligation of the United States to the Creek Nation in this amount; and (2) that under the Civil War Resolution of February 22, 1862, 12 Stat. 614, authorizing the use of Creek annuities which had not been disbursed, for the benefit of refugee Indians in Kansas, that the $29,000 in question was so used, and that this diversion of annuities was ratified and confirmed by petitioner by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790; 2 Kapp. 931.

The dissenting opinion of Judge Littleton reviewed the record, and answered the first contention of the Government pointing out that there was no evidence in the record

to show that this balance was paid to the Creek Nation as such (R. 311, 313); that the evidence showed that soon after the Civil War began the Creek Nation was about evenly divided in its sympathies, and divided into two independent and opposite factions—those in sympathy with the North, and those in sympathy with the South; that the Northern faction, under the leadership of Chief Opoeth-le-yo-ho-la, met in convention on August 5, 1861 in the Creek Nation, and declared that the Creek chiefs who had signed a treaty with the Confederate States had done so without action of the Creek Council, the governing body of the Creek Nation, and had thus forfeited their administrative rank; that the Union-minded Creeks, estimated to number 6,000, or from one-half to three-fourths of the Creeks, fought several battles with the Confederate forces composed partly of the Southern Creeks, along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861, and had withdrawn farther north toward the southern border of Kansas, and were then treating with United States agents for relief for their refugees, and arranging for rendering military assistance by the Creeks to the United States (R. 139-151, 157, 161-185); that in view of the fact that the Creek Nation thus became divided into two independent entities it cannot be said that the portion which remained in the South constituted after November 1861, the Creek Nation; and any payment by the Confederate States near Little Rock, Arkansas, after January 28, 1862, to the Southern portion encamped there "cannot be said to have been payment of the obligation which was owed to the Creek Nation". (R. 310-313).

Judge Littleton analyzed the Government's second claim of credit for the payment of $29,000.00 (R. 313-315), and pointed out that there was no substantial evidence in the record of this case to support a finding that *"the $29,000 in issue* was in fact paid to refugee Indians"; that the Commission did not so find, but found only "that the

United States Congress had approved such payment for the benefit of refugee Indians, 'which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).'"; that the Treaty of 1866 approved and confirmed only "*expenditures made*" by the United States for that purpose; and that there was no evidence to show that this particular $29,000.00 was ever so disbursed. The dissenting opinion then concluded (R. 314):

> "Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856 Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000."

SUMMARY OF ARGUMENT

1. The holding of the Indian Claims Commission, affirmed by the per curiam statement of the majority of the Court of Claims—that the relationship between the United States and the Indian tribes, in this case the Creek Nation, is that of debtor and creditor, or one in which the parties were dealing as equals and at arms length—is contrary to the many decisions of this Court and of the Court of Claims.

This Court has held in a long line of decisions that a fiduciary relationship exists between the United States and the Indian tribes, and that this relationship resembles that of guardian and ward. *Cherokee Nation* v. *Georgia* (1831), 5 Pet. 1, 16-17; *United States* v. *Kagama* (1886), 118 U.S. 375, 383; *Choctaw Nation* v. *United States* (1886), 119 U.S. 1, 27-28; *United States* v. *Payne* (1924), 264 U.S. 446, 448; *Quick Bear* v. *Leupp* (1908), 210 U.S. 50, 80-81; *United States* v. *Creek Nation* (1935),

295 U. S. 103, 109-110; *Seminole Nation* v. *United States* (1942), 316 U. S. 286, 296-297; *Creek Nation* v. *United States* (1943), 318 U. S. 629, 642.

In *Seminole Nation* v. *United States* (1942), 316 U. S. 286, 296-297, this Court held that in carrying out its treaty obligations with the Indian tribes the United States is "something more than a mere contracting party," and that its dealings with the Indians should therefore be "judged by the most exacting fiduciary standards".

In *United States* v. *Creek Nation* (1935), 295 U. S. 103, 109-110, this Court held that the Creek Nation was under the guardianship of the United States, that it was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

In *Quick Bear* v. *Leupp* (1908), 210 U. S. 50, 80-81, this Court held that treaty annuities due an Indian tribe had "exactly the same characteristics" as a "trust fund," and that "they are moneys belonging really to the Indians".

The Court of Claims has held in *Menominee Tribe* v. *United States* (1944), 101 C. Cl. 10, 19-20, that the United States is "a debtor who stands in the position of a trustee or fiduciary toward his creditor", when the creditor is an Indian tribe, and that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee".

In *United States* v. *Seminole Nation* (1959), 146 C. Cl. 171, 181-182, the Court held that the relationship between the United States and the Indian tribes in general is that of "a fiduciary relationship".

The Indian Claims Commission and the Court of Claims should have taken judicial notice of the decisions of this Court holding that a fiduciary relationship exists between the United States and the Indian tribes, and that this

relationship need not be proven in litigation under the Indian Claims Commission Act, which permits only Indian tribes, bands or other identifiable groups of American Indians to present their claims against the United States for final determination.

Whether a general fiduciary relationship or a technical and formal guardian and ward relationship exists between the parties, the remedies available to the injured party are the same. *Dick* v. *Albers* (1910, 243 Ill. 231), 90 N.E. 683, 684-685; *Memonime Tribe* v. *United States* (1944), 101 C. Cls. 10, 19-20; *Seminole Nation* v. *United States* (1942), 316 U. S. 286, 296-297.

Under the well settled principles governing the fiduciary relationship the United States, as the fiduciary, has the burden of accounting strictly to an Indian tribe for the amounts disbursed by it in the fulfillment of its treaty obligations to the tribe. *Dillman* v. *Hastings* (1892), 144 U. S. 136, 140-142; *Villa Site Co.* v. *Copeland* (1920, N. J. Eq.), 111 A. 39, 43; *Ingram* v. *Lewis* (1930, C.C.A. 10), 37 F.2d 259, 260; *Akin* v. *Warner* (1945, Mass.), 63 N.E.2d 566, 569-570; *Garrett* v. *First Nat. Bank & Trust Co. of Vicksburg, Miss.* (1946, C.C.A. 5), 153 F.2d 289, 292; *Sioux Tribe* v. *United States* (1946), 105 C. Cl. 725, 802; *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Pt. 2, Sec. 963, p. 243; *Scott on Trusts (2nd Ed.)*, Sec. 172, pp. 1287-1288.

2. The burden of proof of petitioner with respect to the claims herein presented was satisfied when the Creek Nation proved the total amount of the treaty obligations due it from the United States, and that the admissions in the Government's own accounting showed that it had not disbursed the full amounts due under said treaty obligations, and that the balances claimed by petitioner were due and owing to it. Bogert on Trusts and Trustees, (1948 Ed.) Vol. 4, Sec. 969, pp. 297, 299; *McComb* v. *Frink* (1893), 149 U.S. 629, 644; *In re Tretheway's Estate* (1939, Cal.), 89 P.2d 679, 682; *Florida Fruit Canners* v. *Walker*

(1937, 5 C.C.A.), 90 F.2d 753, 758; *Harrison* v. *Remington Paper Co.* (1905), 140 F. 385, 402.

3. The United States as the fiduciary has the burden of proving the credits it claims on the unpaid balances shown to be due petitioner, the United States alone having kept the records of these transactions; and if the accounts are not clearly kept, or the records are lost or missing, all presumptions are resolved against the fiduciary, and it must stand the resulting loss. *Smith* v. *Robinson* (1914, 83 N.J. Eq. 384), 90 A. 1063, 1065; *Bennett* v. *Weber* (1926, 323 Ill. 283), 154 N. E. 105, 110; *Talbot* v. *Automobile Identification Underwriters, Inc.* (1931, Tenn.) 43 S.W.2d 220, 221; *Smith* v. *Tolversen* (1934 Minn.) 252 N. W. 423, 425; *Benbow* v. *Benbow* (1934, 117 Fla. 37), 157 So. 512, 519; *Florida Fruit Canners* v. *Walker* (1937), 90 F.2d 753, 758; *Sioux Tribe* v. *United States* (1946), 105 C. Cl. 725, 802; *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Pt. 2, Sec. 962, pp. 239-242, 244-245 (footnote), Sec. 971, p. 328; *Restatement of Law of Trusts, Amer. Law Inst.*, Vol. 1, Sec. 172, pp. 445-446; *Pomeroy's Equity Juris.* (4th Ed.), Vol. 2, Sec. 956, pp. 2038-2042.

Wholly apart from the principles governing the fiduciary relationship, it is a general rule of evidence that when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party; and when petitioner's case depends upon the establishment of a negative, as it does here, and the means of proving the facts are within the sole possession of the opposite party, the latter party must produce such proof; and upon his failure to do so, the presumption arises that it does not exist, which of itself establishes a negative. *United States* v. *Denver & R.G.R.R. Co.* (1903), 191 U. S. 82, 92; *Colorado Coal Co.* v. *United States* (1887), 123 U. S. 307, 318-320; *Rossi* v. *United States* (1933), 289 U. S. 89, 91-92. This rule has been held to

apply to accounting cases. *Cliett* v. *Scott* (C.C.A. 5th. 1939), 102 F.2d 725; *Merriam* v. *Venida Blouse Corporation* (S.D.N.Y., 1938), 23 F. Supp. 659, 660-661; *United States* v. *Bull Steamship Line*, (S.D.N.Y., 1956), 146 F. Supp. 210, 213.

Furthermore, the United States has the burden of proving the credits it asserts as payments made by the United States on the claims of petitioner, under Section 2 of the Indian Claims Commission Act. *Menominee Tribe* v. *United States* (1951), 118 C. Cls. 290, 326; *Kiowa, Comanche and Apache Tribes*, 5 Ind. Cl. Comm. 297, affirmed *United States* v. *Kiowa, Comanche and Apache Tribes* (1958), 143 C.Cls. 534, 543.

4. The failure of the Indian Claims Commission to make essential findings of fact necessary to the proper disposition of the claims asserted by petitioner under the 1802, 1805, 1832, 1833, and 1856 Treaties in question, and also the payments made under the 1790 Treaty and the secret article thereof, and making findings not supported by the substantial evidence in the record, are reversible errors. *Seminole Nation* v. *United States* (1942), 316 U. S. 310, 316; *Snake or Piute Indians* v. *United States* (1953), 125 C. Cls. 241, 255.

The failure of the Court of Claims to review the record when the findings of fact of the Commission are challenged upon appeal as not being supported by substantial evidence, falls far short of its duty as an appellate court under the provisions of Section 20(b) of the Indian Claims Commission Act.

When a nation is divided into two independent factions, who consider each other as enemies, and acknowledge no common judge, the nation is dissolved, and neither one represents the nation, and the party in amity with the United States cannot be held responsible for the acts of the other adversary party. *Vattel*, Book III, Ch. XVIII,

pars. 292, 293, Chitty Ed., pp. 424, 427; *Conners* v. *United States* (1898), 33 C. Cls. 317, 325, affirmed *Conners* v. *United States* (1901), 180 U. S. 271, 275-276; *Montoya* v. *United States* (1897), 32 C. Cls. 349, 361-362, affirmed *Montoya* v. *United States* (1901), 180 U. S. 261, 268. The majority of the Creek Nation as an ally of the United States during the Civil War cannot be held responsible for the action of that part of the Creek Nation that joined with the South, and waged war against the United States and the majority of the Creek Nation.

The Creek Nation being thus divided into two independent parties, payment of annuities by the Southern Confederacy to that portion of the Creek Nation that joined the South, would not discharge the obligation of the United States to pay the balance of $29,000 due the Creek Nation under Article VI of the Treaty of August 7, 1856, 11 Stat. 699, here in issue.

The ratification by the Creek Nation of the diversion of Creek annuities for the relief of refugee Indians during the Civil War period in Article XI of the Treaty of June 14, 1866, 14 Stat. 785, applied to amounts actually paid for such purpose, and would not apply to any Creek annuities that had not been proven by the respondent to have been paid for that purpose.

5. The denial of a writ of certiorari by this Court does not constitute an affirmance of the decision of the lower tribunal. *United States* v. *Shubert* (1955), 348 U. S. 222, 228-229; *Sunal* v. *Large* (1947), 332 U. S. 174, 181; *House* v. *Mayo* (1945), 324 U.S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe* (1931), 283 U. S. 401, 403-404; *United States* v. *Carver* (1923), 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.* (1916), 240 U.S. 251, 258; *Darr* v. *Burford* (1950), 339 U. S. 200, 226-228.

ARGUMENT

The majority of the Court of Claims merely affirmed the findings and opinion of the Indian Claims Commission by a per curiam statement, and wrote no opinion analyzing the issues raised upon appeal to that Court. So we must review the dissenting opinion of Judge Littleton (Senior Judge now retired), joined in by Judge Madden (now also retired) which carefully, and we believe correctly, analyzed the issues raised upon the appeal in this case.

1.

A Fidcuiary Relationship Exists Between the United States and the Indian Tribes, Requiring the United States to Account Strictly to the Indian Tribes for the Disbursements Made by It in Fulfillment of Its Treaty Obligations With Them

It is well settled by the many decisions of this Court and the Court of Claims that a fiduciary relationship does in fact exist between the United States and the Indian tribes, the Creek Nation in this case, and that this relationship resembles that of guardian and ward.

The dissenting opinion of Judge Littleton clearly reviews the settled law on this issue as follows (R. 297-301):

> "I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties.
>
> • • • •
>
> "The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to 'be judged

by the most exacting fiduciary standards.' *Seminole Nation* v. *United States*, 316 U. S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> [The Indians] are in a state of pupilage. Their relation to the United States *resembles that of a ward to his guardian.**

"With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in *Creek Nation* v. *United States*, 295 U. S. 103, 109-110:

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* In Cherokee Nation v. Georgia, supra, this Court stated the reasons for its conclusion as follows:

> "* * * The condition of the Indians in relation to the United States is unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.
>
> "* * * They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing their affairs as they think proper; * * *
>
> "* * * They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. * * *"

The Creek Nation, like the Cherokee Nation, acknowledged itself "to be under the protection of the United States of America" in Article II of the Treaty of August 7, 1790, 7 Stat. 35, the first treaty between the Creek Nation and the United States (supra, pp. 11-12).

> • • • the tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
>
> • • • It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

"The Indian Claims Commission itself has recognized that a 'fiduciary relationship' exists between the Creek Nation and the United States. *The Creek Nation* v. *United States*, 2 Ind. Cl. Comm. 66, 114.

"The Supreme Court further defined and established the nature of the relationship between the Government and the Indian tribes as similar to that of guardian and ward in *United States* v. *Kagama*, 118 U. S. 375, where the Court said, 'These Indian tribes *are* the wards of the Nation.' 118 U. S. at 383.

"Appellee places great reliance upon an 1886 decision of this court, *Choctaw Nation* v. *United States*, 21 Ct. Cl. 59, where it was said that the cases 'fall far short of holding that the rules of law as applicable to controversies between guardian and ward are to prevail in suits between the United States and the Indian tribes.' 21 Ct. Cl. at 92-93. Appellee has overlooked the fact that the decision was reversed by the Supreme Court, in *Choctaw Nation* v. *United States*, 119 U. S. 1, and that the Supreme Court said:

> As was said by this court recently in the case of the *United States* v. *Kagama*, 118 U. S. 375, 383: 'These Indian Tribes *are* the wards of the Nation; they are communities dependent on the United States; • • •'
>
> • • • • •
>
> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their

> own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. 119 U. S. at 27-28.

"The Court repeated, in *United States* v. *Payne*, 264 U. S. 446, that, with regard to the Indians,

> • • • the United States occupies the position and assumes the responsibilities of virtual guardianship, • • •. 264 U. S. at 448.

"Of particular importance is the Supreme Court's ruling in *Seminole Nation* v. *United States*, 316 U. S. 286, which involved the question of the handling of annuity payments to Indians. It is true that the treaty had set up a 'trust fund' out of the interest from which the annuities were to be paid. But the Supreme Court did not base its conclusion upon the 'trust nature' of the particular fund involved. The Court stated:

> "'• • • this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most

exacting fiduciary standards. 316 U.S. at 296-297.'

"The Court made clear that the Government's fiduciary responsibilities derive from the *status* of the 'dependent and sometimes exploited' Indians, and that the Government bears these responsibilities 'in its dealings' with the Indians, not, as defendant would have it, merely in connection with those particular dealings which, when occurring between two equal parties, would give rise to fiduciary duties.

• • • •

"The Government strenuously urges that the fact that appellant and the Government stand in a creditor-debtor relation precludes the conclusion that it owes appellant the duties of a trustee. The Government's contention is expressly negatived by the language of this court in *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 20, where the court stated that the Government is 'a debtor who stands in the position of a trustee or fiduciary toward his creditor,' when the creditor is an Indian tribe. The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U. S. 50, 80, said that the amounts there in question, a 'Treaty Fund' of annual appropriations for payment of treaty stipulations, i. e., for payment of a *debt* to the Indians, had 'exactly the same characteristics' as a 'Trust Fund' applied to the education of the Indians. The Court said, 'They are moneys belonging really to the Indians.' 210 U. S. at 81. That case clearly shows that the treatment of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, 'In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.'"

The dissenting opinion, in footnote 5, further pointed out that (R. 302):

"The Government, in its brief in this case, acknowledges that the 'treaty stipulations made the basis of

claim herein, and the allegations of the petition respecting them fall into' the category which the Supreme Court in *Quick Bear* v. *Leupp* described as 'the Indians' money'."

The dissenting opinion continues (R. 302):

"This court has recognized that it is 'settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee.' *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19. In that case, the Government was merely a debtor, yet the court held that it would 'test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee.' 101 C. Cl. at 19. The duty there imposed on the Government was that of seeing to it that the Indians' property—claims against the Government—was productive of an income. This is certainly more than the duty of an ordinary debtor, and no less rigorous than the duty of keeping a clear account of the Indians' claims. The court characterized the Government's position as that of 'debtor-with-the-duties-of-a-trustee', 101 Ct. Cl. at 19 (and has recently characterized the Indians as '*quasi wards*', *Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359, 362)."

In footnote 6 Judge Littleton further pointed out (R. 302-303):

"This court's language in *Gila River Pima-Maricopa Indians* v. *United States*, 135 Ct. Cl. 180, 189, relied on by the Government, is not to the contrary. All that was said in that case was that the *precise, formal* guardian-ward relationship between the United States and an Indian tribe is created by treaty or other specific provision, while in the absence of such express provision, the relationship is one which is similar to or resembles the technical guardian-ward relationship, as was held in *Creek Nation* v. *United States*, 318 U. S. 629, 642; *Seminole Nation* v. *United States*, 316 U. S. 286; and *Menominee Tribe of Indians* v. *United States*, 102 Ct. Cl. 555.

"This court's opinion in the recent case of *United States* v. *The Seminole Nation*, Appeal No. 3-58, de-

cided June 3, 1959, —— Ct. Cl. ——, 173 F. Supp. 784, 790, makes clear that all the *Gila River* case said was that while 'preciseness' in the relationship is found in the particular treaty provision, the nature of the relationship between the United States and Indian tribes in general is that of 'a fiduciary relationship'. The court said (173 F. Supp. at 790):

'Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian "wards".'

"I am also aware of what was said in *Kansas or Kaw Tribe of Indians* v. *United States*, 80 Ct. Cl. 264, 301-302, *cert. denied*, 296 U. S. 577, to the effect that a treaty provision similar to that of Article II of the 1790 Creek Treaty did not create a guardian-ward relationship. That case was decided on December 3, 1934, prior to the Supreme Court's decision in *Creek Nation* v. *United States*, *supra*, announced on April 29, 1935. I think that the *Creek* case vitiates any broad force of this language in the *Kansas* case, which can mean only that *a technical* guardian-ward relationship does not exist. See *United States* v. *Seminole Nation*, *supra*, 173 F. Supp. 784, 790. For the same reason the language in *Omaha Tribe of Nebraska* v. *United States*, 6 Ind. Cl. Comm. 68, 71-74, is of doubtful validity, and is based primarily on the *Kansas* case and a misinterpretation of the *Gila River* case."

The dissenting opinion further stated (R. 303-305):

"I think that the above discussion indicates that the debt owed to an Indian tribe pursuant to a treaty must be 'dealt with by the Government as if it belonged to [the Indians], as morally it does', *Quick Bear* v. *Leupp*, 210 U. S. 50, 80, *supra*, and that the Government is bound by duties of a trustee in dealing with this money. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19, *supra*. The decision of this court in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 725 (certiorari granted, judgment vacated, and case remanded to Court of Claims for determination as to

whether plaintiff-petitioner could assert any additional claims, 329 U. S. 685; supplemental petition dismissed, 112 Ct. Cl. 50; *cert. denied*, 337 U. S. 908), is, therefore, directly applicable here.

> 'The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.'

"In the *Sioux* case, the Indians sought to recover certain amounts disbursed by the Government from trust funds which had arisen from the sale of land belonging to the Indians. The disbursements had been made by the Government for certain Indian agency and educational expenses. The Indians claimed that the disbursements were for obligations of the Government, so that they should not have been paid out of the Indians' funds. The Government maintained that the expenditures were proper charges against the Indians' funds since they were expenditures for the benefit of the Indians, and argued that the Indians had the burden of showing what portion of the disbursements were for obligations of the Government. It said that in the voluminous accounting as to the claims presented it could not be expected to detail with exactness the purposes and amounts of the many disbursements, and that the burden rested on the Indians to prove such details. The court held, however, that the 'primary duty to so classify and report as to the nature and the amount of disbursements rested on defendant.' 105 Ct. Cl. at 802.

"The court said:

> 'Since the Government obligated itself in the treaty and the agreements of 1868, 1877, and 1889 to provide agencies, aid and assistance, schools, and instruction, the burden is on defendant to show what portion, if any, of such expenses has not been assumed by it and should be charged to the Indians. *The Government cannot escape its primary obligations by including, among improper charges against the Indians, expenditures which it now says, without proof, may have been to some unknown and unascertainable extent prop-*

er charges against the Indians. The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.' [Emphasis supplied.]

"The Indian Claims Commission attempted to distinguish the *Sioux* case on the grounds that it involved a 'trust fund' whose handling was 'governed by the rules applying to trustee and guardian,' while the present case 'only involves the relationship of • • • ordinary debtor and creditor.' 7 Ind. Cl. Comm. at 135-136. Since, as has been demonstrated above, an Indian tribe and the Government are not 'ordinary debtor and creditor', and the Government's handling of its debts to the Indians is in fact 'governed by the rules applying to trustee and guardian', the *Sioux* case is very much in point here.

"The relationship between the United States and appellant is not *precisely* that of guardian and ward, but their relationship is sufficiently similar thereto to impose upon the United States the duty of maintaining a clear and unambiguous account of its payments to appellant under its various treaty commitments.

"The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical understanding of the problems involved in this particular aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account

of the payments it makes pursuant to its obligations to the Indians."

The cases reviewed in the dissenting opinion of Judge Littleton support the view that a general fiduciary relationship does exist between the Indian tribes and the United States, and that this relationship developed from the great disparity of the parties, the complete dependence of the Indian tribes upon the United States in the dealings between them, and under the provisions of treaties under which these tribes agreed to come under the protection of the United States.

In Words and Phrases (Perm. Ed.), Vol. 8A, p. 103, it is stated:

> "'Confidential relationship' exists when circumstances make it certain that parties do not deal on equal terms, but on one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed and does not exist where parties deal on terms of equality. In re Stroming's Will, 79 A.2d 492, 495, 12 N. J. Super. 217."

Given a general fiduciary relationship, or a technical formal guardian and ward relationship, the remedies applicable to both are the same. In the case of *Dick* v. *Albers* (1910, 243 Ill. 231), 90 N. E. 683, 684-685, the Court states:

> "• • The terms 'fiduciary relation' and 'confidential relation' have frequently been used interchangeably by courts and law writers. In general, the relationship is one in which if a wrong arise the same remedy exists on behalf of the injured party as would exist against a trustee on behalf of the cestui que trust. Central Nat. Bank v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person. In such case he is not allowed to derive any profit or advantage from the relation between them, except upon proof of full knowledge and consent of the other person. The relations of attorney and client, principal and agent,

guardian and ward, are familiar illustrations of fiduciary relations. The relation exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The rule embraces both technical and fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another. The origin of the confidence reposed is immaterial. Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808."

See also *Menominee Tribe* v. *United States* (1944), 101 C.Cls. 10, 19-20.

This Court applied the above principle in *Seminole Nation* v. *United States*, 316 U. S. 286, 296-297, and stated that in carrying out its treaty obligations with the Indian tribes, the Government is *more than a mere contracting party*, and that its dealings with the Indians should "be judged by the most exacting fiduciary standards."

The Commission properly found that the petitioner was an Indian tribe, and that it had authority to present this claim under the Indian Claims Commission Act (R. 264). As this act applies solely to tribes, bands and identifiable groups of American Indians, we submit that the Commission erred in finding that the petitioner must further prove affirmatively that a general fiduciary relationship existed between the Creek Nation and the United States; and suggests that the Commission and the majority of the Court of Claims should have taken judicial notice of the decisions of this Court, and their own decisions, holding that a fiduciary relationship does in fact exist between the Indian tribes and the United States.

Clearly the dissenting opinion of Judge Littleton, concurred in by Judge Madden, correctly reflects the many holdings of this Court that a fiduciary relationship does exist between the Indian tribes and the United States, and that the United States, as the fiduciary, has the bur-

den of making a clear and precise accounting to petitioner for the payments it made under its treaty obligations here brought into question. *Dillman* v. *Hastings* (1892), 144 U. S. 136, 140-142; *Villa Site Co.* v. *Copeland* (1920, 91 N. J. Eq. 503), 111 A. 39, 43, 13 A. L. R. 356; *Ingram* v. *Lewis* (1930, C.C.A. 10), 37 F.2d 259, 260, 70 A.L.R. 702; *Akin* v. *Warner* (1945, Mass.) 63 N.E.2d 566, 569-570; *Garrett* v. *First Nat. Bank & Trust Co. of Vicksburg, Miss.* (1946, C.C.A. 5), 153 F.2d 289, 292; *Sioux Tribe* v. *United States* (1946), 105 C. Cls. 725, 802; *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Pt. 2, Sec. 963, p. 243; *Scott on Trusts* (2nd Ed.) Sec. 172, pp. 1287-1288.

2.

Petitioner Was Entitled to Rely upon the Admissions Contained in the Government's Accounting Report

In 1932 the United States accounted to the Creek Nation for the first time for the manner in which it performed its treaty obligations to that tribe, and filed its accounting report in Case H-510, *Creek Nation* v. *United States*, 78 C. Cls. 474, involving disbursements of Creek funds for the period beginning July 1, 1898 (R. 15-16). This suit was filed under the jurisdictional act of May 24, 1924 c. 181, 43 Stat. 139, as amended by Joint Resolution of May 19, 1926, c. 341, 44 Stat. 568, and by Joint Resolution of February 19, 1929, c. 268, 45 Stat. 1229, limiting the time for filing claims thereunder to June 30, 1930 (R. 16-17). As the accounting report was not filed in that proceeding until August 10, 1932 (R. 15-16), after the date for filing claims had expired, the claims now presented were not litigated in Case H-510, but petitioner was required to wait until the passage of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, to do so.

The admissions in the accounting report of the Government clearly show that the balances herein claimed to be

due the Creek Nation had not been disbursed by the United States in fulfillment of its treaty obligations to the Creek Nation in question. As the dissenting opinion of Judge Littleton, states (R. 295):

> "Appellant introduced in evidence before the Indian Claims Commission the records of treaty payments to appellant which were maintained by the Government and are now in the custody of the General Accounting Office. These records do not specifically show that the entire amounts due under the various treaties in issue were paid to appellant.
>
> "The amounts claimed by appellant are $62,309.75 under the Treaty of 1802, $36,547.75 under the Treaty of 1805, $10,061.01 under the Treaty of 1832, $29,404.55 under the Treaty of 1833, and $29,000 under the Treaty of 1856. The total claimed is $167,323.06."

Petitioner has set forth above the balances shown by the Government's accounting to be due and owing to petitioner under the several treaties in issue.

Bogert on Trusts and Trustees (1948 Ed.), Vol. 4, Pt. 2, Sec. 969, pp. 297, 299, states:

> "It is elementary that the cestuis and other interested parties should be given an opportunity to examine the account and object to any item. * *
>
> "The issues are framed by the account and the objections thereto."

See also In re *Tretheway's Estate* (1939, Cal.), 89 P.2d 679, 682; *Florida Fruit Canners* v. *Walker* (1937, 5 C.C.A.), 90 F.2d 753, 758; *Harrison* v. *Remington Paper Co.* (1905), 140 F. 385, 402. As was stated in *Florida Fruit Canners* v. *Walker*, supra, at p. 758:

> "* * A trustee has the burden of establishing the correctness of his account because either the charges in that account are a matter of record, are admitted in the account, or are solely within the knowledge of the trustee; and the trustee is undertaking to satisfy those charges against him by proof of allowable cred-

its in his favor. When it is established that a certain value has come into his possession by virtue of the trust relation, he has the burden of showing that that value is offset by a proper credit in his account. * * *"

See also *McComb* v. *Frink* (1893), 145 U.S. 629, 644.

The parties agreed, except with respect to the claim under the 1833 Treaty, on the total amount of the obligations of the United States to the Creek Nation under each of the treaty provisions in question, and the Government's accounting report clearly sets forth the total disbursements made by the United States under these total treaty obligations. The balances herein claimed constitute the differences between the total treaty obligations owing to the Creek Nation, and the total amounts actually disbursed by the United States in fulfillment thereof, as disclosed in the Government's accounting report. The petitioner thus supported the claims herein presented, by the Government's own accounting report.

3.

The United States as the Fiduciary Has the Burden of Proving the Credits It Claims

Petitioner contended before the Commission, and on appeal in the Court of Claims, that the United States, as the fiduciary, had the burden of proving the credits it claimed against the specific balances shown by its own accounting report to be due the Creek Nation under the treaty obligations in issue.

The Indian Claims Commission stated in its opinion (7 Ind. Cl. Comm. at p. 132; R. 277):

"* * * we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether

> the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor."

The dissenting opinion of Judge Littleton defined the issue, as it relates to petitioner's claims under the Treaties of 1802 and 1805, as follows (R. 296):

> "Appellee's contention is that, because appellant did not show that any of this $99,461.45 was *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government is entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeds the $98,857.50 claimed by appellant to be due, so appellee's theory would defeat recovery under these two treaties. The Indian Claims Commission adopted the Government's position and determined that nothing was due to appellant. 7 Ind. Cl. Comm. 117.
>
> "Appellant argues that the relationship between the United States and an Indian tribe is such that the Government has the burden of presenting an accurate accounting of its payments to appellants pursuant to the treaties in question. Appellant maintains, therefore, that the Government is not entitled to credit for any amounts not specifically allocated on its books to fulfillment of these treaties."

The fallacy of the Commission's holding, affirmed by the majority of the Court of Claims, is quite apparent: (1) it denies the general fiduciary relationship existing between the parties which the decisions of this Court hold arises out of the great disparity of the parties; (2) it places upon petitioner the burden of proving the credits claimed by the fiduciary, whereas the law places upon the fiduciary the burden of proving its own claimed credits; and (3) it charges petitioner with the entire amount of disbursements made under the Treaty of 1790

against the Treaties of 1802 and 1805, without taking into account the obligations of the United States under the 1790 Treaty, and the Secret Article thereof; and (4) it requires the petitioner to prove a negative, when the proof of such facts is solely within the knowledge and control of the respondent, and not within the knowledge of petitioner.

The holding of the Indian Claims Commission, as affirmed, would impose upon the Indian tribe the burden of proving a negative--that the tribe did not receive the balances claimed to be due under the treaties in question, when the Government's own accounting report shows that the United States failed to disburse said balances in fulfillment of the obligations it assumed under these treaties. In other words, the tribe would be charged with explaining the government's accounting, and with endeavoring to allocate the disbursements shown therein, which the Government's own accounting officers cannot definitely allocate to any particular Creek treaty obligation. It can well be wondered how an Indian tribe, unfamiliar with the accounting methods of the United States, and ignorant of the English language, could explain the ambiguities contained in the Government's own accounting report, which defendant's own accounting officers state they are unable to do themselves.

As Judge Littleton's dissenting opinion pointed out, the Sioux Case, supra, clearly settled the question of whether the United States or an Indian tribe, has the burden of proof in such accounting matters. Judge Littleton, also wrote the decision of the Court of Claims in the Sioux Case, ~~and in his dissenting opinion in the instant case,~~ Case in which the Court of Claims clearly held that:

> "• • • The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting." 105 C. Cl. at p. 802.

The views of Judge Littleton are consistent with the well settled principles governing an accounting by the guardian to his ward. In *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Part 2, Sec. 962, pp. 239-242, it is stated:

> "'To keep an accurate account is one of the primary duties of a trustee. The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expenditures which he claims to have made were correct, just and necessary. • • • He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him.'"
>
> • • • •
>
> "The principal penalty usually stated to apply to a trustee who fails to keep proper records of his trust is that 'all presumptions are against him' on his accounting, or that 'all doubts on the accounting are resolved against him.' • • •
>
> "• • • If he claims that he made payments to creditors or cestuis, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow the item. Had the trustee performed his duty by taking receipts of vouchers, he could have made a clear case for the disbursements. His failure to present such evidence casts suspicion on the claim and renders the court unwilling to hold that he has borne the burden of proving the payment by a preponderance of the evidence.
>
> • • • •
>
> "If the trustee claims that he kept an account book but that he has lost it, it has been held that he must bear the burden of proving the payments which he alleges were shown by the book, and that doubts will be resolved against him. • •"

In the footnote at pages 244-245 it is further stated:

> "It is well settled that when a fiduciary relation is shown to exist, and property or property interests

> have been intrusted to an agent or trustee, the burden is thrown upon such agent intrusted to render an account and to show that all his trust duties have been fully performed, and the manner in which they have been performed. It is assumed that the agent or trustee has means of knowing and does know what the principal or cestui que trust cannot know, and is bound to reveal the entire truth. * * * It is not necessary in such a case as this that the plaintiff should show that there will be something found due to her on the accounting. That fact can never be known with certainty until the account has been taken. The right to this accounting results from the facts that the fiduciary relation has been created and assumed by the agent or trustee and that the principal or cestui que trust is not informed and does not know what has been done with reference to the property or property interests confided to the agent or trustee. Frethey v. Durant, 48 N. Y. S. 839, 24 App. Div. 58, 61, 62."

And Section 971, p. 328, states:

> "The burden is on the accounting trustee to prove to the satisfaction of the court the merit of all claims for credit which he makes. * * *"

See also the *Restatement of the Law of Trusts, American Law Institute*, Vol. 1, Sec. 172, pp. 445-446; *Pomeroy's Equity Juris.* (4th Ed.) Vol. 2, Sec. 956, pp. 2038-2042.

It is well settled that the trustee has the burden of proving the credits claimed by him. *Talbot* v. *Automobile Identification Underwriters, Inc.* (1931, Tenn.) 43 S.W. 2d 220, 221; *Smith* v. *Tolversen*, (1934 Minn.) 252 N.W. 423, 425; *Florida Fruit Canners* v. *Walker* (1937), 90 F. 2d 753, 758; *Smith* v. *Robinson*, (1914, 83 N. J. Eq. 384), 90 A. 1063, 1065.

It is also well settled that if the trustee loses his accounts he must bear any resulting damage, *Benbow* v. *Benbow*, (1934, 117 Fla. 37), 157 So. 512, 519; and the difficulty in making proof of expenses and disbursements by

the trustee is no reason why the rule of strict accountability should be relaxed. *Bennet* v. *Weber* (1926, 323 Ill. 283), 154 N.E. 105, 110.

We submit that the petitioner has amply proven its case by alleging and proving the total extent of the Government's treaty obligations, and further showing by the Government's own accounting records, that the total obligations of the Government have not been fulfilled. Clearly the Government must be held to be responsible for the ambiguities in its own accounting, in view of its duty as the fiduciary to render clear and accurate accounts of the amounts disbursed in fulfillment of its treaty obligations to an Indian tribe.

The dissenting opinion of Judge Littleton pointed out that the obligation of the United States under the Treaty of 1790 was at least $1,500 per year, and for the years 1790 through 1797, and 1800 through 1809, a total of eighteen years, the Government's records do not specifically show payment of this $1,500 annuity, and that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 Treaty obligation; and that of the $99,461.45 shown by the Government's accounts to have been paid to the Creeks, but not allocated to specific treaties, at most $72,461.45 can be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805, leaving a balance of $26,396.05 which is not shown to have been paid. (R. 307). However, the dissenting opinion concludes (R. 307):

> "• • • In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allowable to the Government against its 1802 and 1805 treaty obligations, given the state of its records."

We believe that even this burden petitioner should not bear, and in this instance petitioner differs from the dissenting opinion. It must be remembered that the respondent injected into the case the disbursements under the Treaty of 1790, in order to show credits due it on the balances shown to be due petitioner under the Government's obligations under the Treaties of 1802 and 1805. However, the Government had assumed obligations under the 1790 Treaty, other than the $1,500 annual payment. Under Article XII it obligated itself to furnish "from time to time gratuitiously the said nation with useful domestic animals and implements of husbandry"; and under the secret article agreed to pay the Creek chiefs an annual stipend for life, in the amount of $1,200 to Alexander McGillivray, and to each of 6 other Chiefs $100 a year for life, or $600.00 annually (R. 197). We submit that if the respondent is entitled to credit in any amount shown by its accounting as disbursements under the 1790 Treaty, it must prove that it is entitled to further credits against the Government's obligations under Treaties of 1802 and 1805 out of the net balance of $72,461.45. Certainly it is better able to explain it own accounting records, and what these disbursements were for than petitioner, and if it cannot prove that it is entitled to further credits from this amount of $72,461.45 the presumptions are against the fiduciary, and it would be entitled to no further credits against the 1802 and 1805 Treaty obligations.

As the statute of limitations is waived by the Indian Claims Commission Act the claims are to be considered as if they developed today.

Quite apart from the duty of the United States as the fiduciary to account as such, an independent principle places the burden upon the United States here. It is established that the funds in question came into the Government's hands; that it alone has the books of account to explain what happened to the funds; and if the negative

averment of non-payment be not true, it is peculiarly within the Government's hands to establish the fact. As a result, the burden is squarely on the United States for

> "• • • It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev. sec. 79, 'that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative. • • •" *United States* v. *Denver & R.G.R.R. Co.* (1903), 191 U.S. 84, 92.

To the same effect is *Colorado Coal and Iron Co.* v. *United States* (1887), 123 U.S. 307, 318-320. *Rossi* v. *United States* (1933), 289 U.S. 89, 91-92.

As shown by the foregoing citations, the United States is subject to this rule of evidence. And the rule has been flatly held to apply in accounting cases, as where a surviving partner, with the books of account, has it peculiarly within his knowledge or means to make the accounting. *Cleit* v. *Scott* (C.C.A. 5th, 1939), 102 F.2d 725. See also, *Merriam* v. *Venida Blouse Corporation* (S.D.N.Y., 1938), 23 F.Supp. 659, 660-661; *United States* v. *Bull Steamship Line*, (S.D.N.Y., 1956), 146 F.Supp. 210, 213.

The dissenting opinion also pointed out (R. 293):

> "• • • Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to bur-

den of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims)."

Furthermore, Section 2 of the Indian Claims Commission Act, provides in part that "the Commission shall make appropriate deductions for all payments made by the United States on the claim". It is now well settled that under this provision of the Act the United States has the burden of proving the credits it asserts against the claims presented by the petitioner. *Menominee Tribe* v. *United States* (1951), 118 C. Cls. 290, 326; *Kiowa, Comanche and Apache Tribes*, 5 Ind. Cls. Comm. 297, affirmed *United States* v. *Kiowa, Comanche and Apache Tribes* (1958) 143 C. Cls. 534, 543.

4.

The Majority of the Court of Claims Failed in Its Duty as an Appellate Court under Section 20(b) of the Indian Claims Commission Act to Determine Whether the Findings of the Commission Are Supported by Substantial Evidence When the Findings Are Challenged on Appeal

Petitioner assigned as error and contended before the Court of Claims on appeal that the Indian Claims Commission failed to make proper findings of fact essential to the proper disposition of the claims under the Treaties of 1802 and 1805, 1832, 1833, and 1856, and made findings not supported by the substantial evidence in the record with respect to petitioners claim under the 1856 Treaty (R. 284-291).

The majority of the Court of Claims failed completely to review the record and decide whether the findings of the Commission were supported by substantial evidence, or whether the Commission made findings essential to the proper disposition of the claims herein presented, as it was in duty bound to do under Section 20(b) of the Indian Claims Commission Act.

The dissenting opinion states (R. 293-294):

"• • • Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Court of Appeals in appeals from the District Courts, 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. It provides:

> "On said appeal the Court *shall* determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. • • • [Emphasis supplied.] 25 U.S.C. § 70s(b).

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail."

However, the dissenting opinion of Judge Littleton, joined in by Judge Madden, did review the whole record and pointed out the shortcomings of the findings of the Commission with respect to each of the claims in question (R. 307-315). We review the facts disclosed by the record that should have been considered by the Commission in determining this case.

Claim Under Treaties of 1802 and 1805

As pointed out by Judge Littleton, the Commission charged against the balance of $98,857.50, shown by the Government's accounting report to be due petitioner under the 1802 and 1805 Treaties, the total of the unallocated items which could not be identified with these treaties, or $99,461.45, and thus offset the amount due petitioner under them; but in doing so failed to find facts relating to the obligations under the Treaty of 1790, which were shown not to have been fulfilled during the period 1790 through 1810 (R. 307). The dissenting opinion pointed out that at least $26,396.05 was due petitioner under the provision of the 1790 treaty requiring the Government to pay $1,500.00 per annum as a permanent annuity over this period (R. 307), leaving a balance of $72,461.45, of the unallocated items, which possibly could be charged against the balance of $98,857.50 due under the 1802 and 1805 Treaty obligations of the United States (R. 307-308). Judge Littleton further suggested that the case should be remanded to the Indian Claims Commission to permit appellant to show any other obligations of the United States, in addition to the $1,500 annuity under the 1790 Treaty, for which the payments shown for the years 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which he found to be the maximum allowable to the Government against its 1802 and 1805 Treaty obligations (R. 307-308).

The dissenting opinion, therefore, recognizes that there were other obligations of the United States under the Article XII of the 1790 Treaty requiring it to furnish the Creek Nation with useful domestic animals and implements of husbandry, and to supply interpreters; and also the obligation under the secret article of this treaty to pay yearly stipends to Creek Chiefs during the period of their lives, which could make up considerable of the $72,461.45 balance. (R. 197, 215). For instance, the record shows that three of the medal chiefs were still living in 1811, and that the United States estimated payments due them of $300.00 for that year (R. 219-220, 226, 230-231). Also the letter of Benjamin Hawkins, United States Agent for the Creek Nation, to the Secretary of War, dated July 9, 1807, states in part, "I have heard nothing of the goods or articles deemed necessary for the plan of civilization for the present year. The agricultural part is retarded for want of the hoes, however the supply will be equally useful the ensuing year" (R. 215), indicating clearly that such items were forwarded or expected to be forwarded under Article XII of this treaty.

We submit that in view of the fact that the respondent injected the 1790 Treaty payments into the case in order to show credits due it, that it, as the fiduciary, has the burden of showing that any of the $72,461.45, or the balance of the unallocated items, was due as a credit on the balance of $98,857.50 shown to be due petitioner on the Government's 1802 and 1805 Treaty obligations.

As the Commission made no findings with respect to the unfulfilled obligations of the United States under the Treaty of 1790 and the secret article thereof, we submit that the Court of Claims should have remanded the case to the Commission for such essential findings.

Claim Under Treaty of 1832

Judge Littleton further pointed out that the Commission failed to make essential findings of whether or not the

Government's obligation under Article XIII of this treaty had been fulfilled, and stated (R. 308):

> "I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its face, the Commission's 'finding' is merely a restatement of the Government's contention, and not a finding at all.
>
> "The Commission's 'ultimate' finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final determination and remand the case so that such findings may be made. Snake or Piute Indians v. United States, 125 Ct. Cl. 241, 255."

Claim Under Treaty of 1833

With respect to the claim under the Treaty of 1833, Judge Littleton stated (R. 309-310):

> "The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had 'not proven the alleged failures of the appellee to fulfill its obligations * * *'. 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination."

We submit that this is a correct conclusion to be reached with respect to the Commission's failure to make essential findings necessary to the proper disposition of this claim.

Claim Under Treaty of 1856

Judge Littleton pointed out in the dissent that with respect to petitioner's claim under the Treaty of 1856, the Commission's finding—that the $29,000 balance due the Creek Nation as interest on the $200,000 trust fund, provided for in Article VI of the Treaty of August 7, 1856, 11 Stat. 699, was paid to the Creek Nation—was not supported by substantial evidence, and that the evidence in the record does not support the finding that this payment was made to the Creek Nation.

The respondent claimed credit for two separate payments of the $29,000 due: (1) the payment made by the Confederate States, and (2) payment of said amount to refugee Indians, not necessarily Creek refugee Indians (R. 33-34), under the Civil War Resolution of February 22, 1862, 12 Stat. 614, and ratified by the Creek Nation by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790. (R. 310, 313).

Judge Littleton reviewed the entire record, compared it with the findings of the Commission, and set forth the facts as follows (R. 310-315):

> "* * * Appellant claims that the stipulated interest for the years 1857 through 1861, inclusive, a total of $50,000, was appropriated by Congress but that appellee's records show distributions of only $21,000 pursuant to this obligation. Appellant claims the balance of $29,000. Appellee claims credit for two separate payments of the $29,000.
>
> "(1) First, appellee claims that the $29,000 was paid to the Creek Nation by the Confederate States of America, pursuant to the treaty, dated July 10, 1861, between the Confederate States and the Creek Nation. Appellee asserts that the Creek Nation's acceptance of the payment by the Confederate States of the payment by the Confederate States of the United States' obligation discharged the United States liability.

"Appellant does not contest appellee's proposition of law, but denies that there was proper payment or, if there was, that it was validly accepted by the Creek Nation.

"The Indian Claims Commission found:

> 'In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States.
>
> 'The Confederate States paid the $29,000 and plaintiff accepted the same.
>
> 'The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866.'

"Appellant argues that the Treaty of July 10, 1861, between the Creek Nation and the Confederate States, concluded at North Fork Village on the North Fork of the Canadian River, west of Arkansas, which provided for the payment of the $29,000 by the Confederate States, was only approved by some of the Creek chiefs without the action of the Creek Council, the governing body of the Creek Nation, and that the Creek Nation was about evenly divided in sympathies between the Union and the Confederacy. [R. 145, 155-157, 161, 166].

"I do not think that there is any evidence that the $29,000 was paid to the Creek Nation. The evidence shows that in Article XLI of the 1861 Treaty the Confederate States agreed to pay the $29,000 [R. 256-257]; that the Provisional Congress of the Confederate States appropriated the $29,000 on December 24, 1861 [R. 257]; that on December 30, 1861, that amount was requisitioned by J. P. Benjamin, the Confederate Secretary of War, from the Confederate Secretary of the Treasury [R. 259]; that on the same date C. G. Memmenger, the Secretary of the Treasury, ordered

a War Department Warrant No. 16 to be issued in favor of General Albert Pike, a War Department agent, for delivery to Major Elias Rector, Superintendent of Indian Affairs [R. 259]; that on January 1, 1862, S. S. Scott, Acting Commissioner of Indian Affairs, wrote to Major Rector at Fort Smith, Arkansas, informing him that the money was in the hands of General Pike for delivery to him [R. 261]; and that on January 28, 1862, General Pike wrote to Major Rector from Little Rock, Arkansas, informing him that he supposed he would reach Fort Smith in six days [R. 262-263]. It is true that there is no receipt for the $29,000, but in the light of the evidence which I have detailed, I think it was not improper for the Indian Claims Commission to conclude that the money was received by the Indians. See *Chickasaw Nation* v. *United States*, *supra*, 103 Ct. Cl. at 35.

"However, although the evidence may be sufficient to support a finding that a payment of $29,000 was made to some Creek Indians, there is no indication that this payment was made to the Creek Nation, as distinguished from some portion thereof. The obligation here was owed to the Creek Nation, and could not be satisfied by payment to any party other than the Creek Nation. Debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Therefore, a payment to any party other than the Creek Nation, even if that party was some portion of the Creek Nation, cannot have satisfied the obligation owed to the Creek Nation unless the party receiving payment was authorized to receive it on behalf of the Creek Nation. The evidence upon which appellee relies to show payment indicates that no payment was made to any party before January 28, 1862, on which date General Pike, the Confederate representative charged with delivering the money to the Creeks, was still at Little Rock, Arkansas [R. 262-263]. The evidence also indicates that after the treaty with the Confederacy had been signed on July 10, 1861, a considerable portion of the Creek Nation, under the leadership of Opoeth-le-yo-ho-la, was in sympathy with the Union. This group met in convention on August 5 and de-

clared that the chiefs who had signed the Confederate treaty had forfeited their administrative rank [R. 161]. A 'Non-Treaty Party' moved westward to avoid the reach of those who were sympathetic to the Confederate cause, and sent messengers to confer with representatives of the United States [R. 161-166]. The evidence also shows that by November 15, the Union-minded Creeks had withdrawn further north, toward the southern border of Kansas, and that they fought a series of battles with Confederate forces along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861 [R. 140-146, 165-174]. The size of the group with Opoeth-le-yo-ho-la is estimated at around 2,000 men, plus women, children, and the sick and aged, in a total number of perhaps 6,000, estimated to be from one-half to three-fourths of the Creeks [R. 140-141, 145-146, 166, 183]. It also appears that during the months of November and December representatives of the refugee Creek groups were treating with United States agents for relief for the refugees and arranging for the rendering of military assistance by the Creeks to the United States [R. 142-144, 148, 175-184].

"It seems to me to be clearly established by the evidence that the Creek Nation had become divided into two independent entities. It cannot be said that the portion which remained in the South constituted, after some time in November of 1861, the Creek Nation. Payment to this southern group cannot be said to have been payment of the obligation which was owed to the Creek Nation.

"The record is barren of any evidence to show payment to an entity which could be called the Creek Nation, since it shows, as pointed out by appellee, that payment was made somewhere in the vicinity of Little Rock, Arkansas (that is, at the camp of the Southern group) some time after January 28, 1862 (that is, when the Creeks remaining in that vicinity no longer constituted the Creek Nation).

"(2) The basis for appellee's second claim of credit for a second payment of the $29,000 is that the United States authorized payments, out of Creek annuities

which had not yet been paid, for the benefit of refugee Indians during the Civil War, Resolution of February 22, 1862, 12 Stat. 614; that the $29,000 here in question was so used; and that the use of the annuities for that purpose was ratified and confirmed by appellant by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790.

"The Supreme Court's decision in *Seminole Nation* v. *United States*, 316 U. S. 286, 290-291, supports appellee's legal position, if in fact the $29,000 here in question has been shown to have been disbursed for the benefit of refugee Indians. In the *Seminole* case this court had found that the $61,563.42 in question had been diverted *and disbursed* by the Government.

"While it is clear that payments were made by the United States for the benefit of refugee Indians, I do not think that there is substantial evidence in this case to support a finding that *the $29,000 in issue* was in fact paid to refugee Indians. I note that the Indian Claims Commission did not so find. It found only that the United States Congress had approved such payment for the benefit of refugee Indians," 'which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).'

"The Treaty of 1866 approved and confirmed *expenditures made* by the United States since the diversion of annuities for that purpose. The fact that other annuity money was diverted for payment to the refugees does not establish that the United States' obligation for this $29,000 was released.

"The evidence in this case shows that $343,321.17 was disbursed by the United States, during the years 1862 to 1867 for the relief of refugee Indians, under the appropriation entitled 'Fulfilling Treaties with Creeks.' Appellee says that Creek treaties in force during that period provided for a total of $229,260 in annuities payable to the Creeks. This figure appears

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"[2] The approval was not specifically of the $29,000, but of all 'annuities payable to the * * * Creeks * * * and which have not been paid.' Resolution of February 22, 1862, 12 Stat. 614."

to have been taken from the total amounts appropriated under Creek treaties by Congress in the fiscal years 1862-1866.

"Appellee argues that because the amount expended for the relief of refugee Indians exceeded the total of the United States' obligations for the period in question by more than $29,000, the $29,000 due under Article VI of the Treaty of 1856 is shown to have been expended for the refugee Indians. This does not follow at all. There may well have been other outstanding treaty obligations which formed the basis for the 1862-1867 expenditures. Indeed there must have been, since the excess of expenditures over current treaty obligations was considerably more than $29,000.

"Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856 Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000."

Therefore, the Commission failed to find the essential facts set forth above in the dissenting opinion of Judge Littleton, and found facts which were not supported by the substantial evidence in the record.

It is well settled that the failure of the lower court to make essential findings of fact, or makes findings not supported by substantial evidence, are reversible errors. *Seminole Nation* v. *United States* (1942), 316 U. S. 310, 316; *Snake or Piute Indians* v. *United States* (1953), 125 C. Cls. 241, 255.

Therefore, we submit that this case should be reversed and remanded for this further reason, and that the Commission be directed to make proper findings essential to

the proper disposition of the claims herein presented, and in accord with the substantial evidence in the record.

The views of the dissenting opinion above quoted are supported by well settled principles of law. The Creek Nation divided into two independent parties: one, constituting the majority, that maintained its loyalty to the United States and became its ally; and the other, constituting the minority, that joined the Southern cause.

Vattel states (Book III, Ch. XVIII, pars. 292, 293; Chitty Ed., p. 424):

> "When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him,—or when, in a republic the nation is divided into two opposite factions, and both sides take up arms,—this is called a civil war. • • •"
>
> • • • •
>
> "A civil war breaks the bands of society and government, or, at least, suspends their force and effect: it produces in the nation two independent parties, who consider each other enemies, and acknowledges no common judge."

And at page 427: he states:

> "But, when a nation becomes divided into two parts absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect, as a public war between two different nations."

In *Conners* v. *United States* (1898), 33 C. Cls. 317, 325 the Court said:

> "• • • it must likewise be held that where the United States engages in war with a distinct portion of a tribe, acting independently of the tribe over which the tribe can exercise no control, being in fact a distinct military command, the tribe in amity can not be held responsible for the act of the hostile Indians."

In affirming this case this Court in *Conners* v. *United States* (1901), 180 U. S. 271, 275-276, stated:

"While the ghastly facts of this case, which are set forth with much greater detail in the opinion of the Court of Claims, appeal strongly to the generosity of Congress to recompense those who have suffered by the inconsiderate and hasty action of the troops in dividing these Indians into hostility, they afford no ground whatever for a judgment against the tribes to which these Indians originally belonged, but from which they had separated and carried on independent operations. In fact, it would be highly unjust to add to their manifest sufferings the payment of these damages from their annuities, or for other funds standing to their credit. * * That band itself was beyond the control of the tribes to which it originally belonged is equally clear. As stated by the court below, 'It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States, but it was the case of an entire body waging armed resistance, with all its might and will all the ferocity of Indian warfare, against whatever power the United States could bring to bear upon them. * * *.'"

To the same effect is *Montoya* v. *United States* (1897), 32 C. Cls. 349, affirmed by this Court in *Montoya* v. *United States* (1901), in 180 U. S. 261, 268, in which this Court stated:

"* * * On the other hand, if the marauders are so numerous and well organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the tribe responsible for their acts. It can hardly be supposed that Congress would impose a liability upon tribes in amity with the United States, for the acts of an independent band, strong enough to defy the authority of the tribe, although it would not be inequitable to hold the tribe liable for individual members whom it was able, but had failed, to control."

Clearly, the minority portion of the Creek Nation that joined the South, and acted independently of the majority portion of the Creek Nation that remained loyal to the United States and became its ally, and fought three battles with the majority portion of the Creek Nation, did not constitute the Creek Nation, as Judge Littleton clearly pointed out in the dissenting opinion.

Furthermore, the respondent's own accounting shows that most of the $343,321.17 of Creek annuity moneys diverted for refugee Indians during the Civil War period, was not disbursed for Creek refugees. (R. 33-34).

5.

A Denial of a Writ of Certiorari by This Court Does Not Constitute an Affirmance of the Decision of the Lower Court

The Indian Claims Commission relied largely upon the decision of the Court of Claims in *Chickasaw Nation* v. *United States* (1945), 103 C. Cls. 1, instead of later opinions of the Court of Claims overruling the Chickasaw Case, and gave as its reason that the Chickasaw Case decision was affirmed by a denial of certiorari by this Court.

In reviewing the Indian Claims Commission opinion, as affirmed by the majority of the Court of Claims, the dissenting opinion of Judge Littleton stated (R. 300-301):

> "The Indian Claims Commission relied heavily, in its decision of this case, upon *Chickasaw Nation* v. *United States*, 103 Ct. Cl. 1, certiorari granted, limited to question of specific designation of offsets, and judgment reversed, 326 U. S. 217. That case does support appellee's position, but does not have the weight attributed to it by the Indian Claims Commission as a result of the Commission's misconception of the meaning of the Supreme Court's denial of certiorari as to the issues relevant to this case.

"In *Chickasaw* the Government's records showed that it had purchased annuity goods for various tribes, but did not show how much of these goods had been allocated to the Chickasaws as distinguished from the other tribes. This court said, 'Unless this allocation is known, the shortage, if any, in the goods annuity of $3,000 cannot be ascertained. The accounts show no shortage for which judgment may be given.' 103 Ct. Cl. at 35-36. It should be noted, however, that the problem did not receive extended consideration by this court in *Chickasaw*. The Indian Claims Commission, however, in relying upon *Chickasaw* rather than upon more recent decisions of this court which support the conclusion which I would reach, stated that 'The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in *Chickasaw*] is evidence that it approved the holdings of the Court of Claims in reference to such matters.' 7 Ind. Cl. Comm. at 135. The Commission went on to say that the decision of this court in *Sioux Tribe of Indians* v. *United States*, 105 Ct. Cl. 725, *infra*, 'could not overrule the [*Chickasaw* case] because the *Sioux* case is a Court of Claims opinion only, while the holdings in the *Chickasaw* case were approved by the Supreme Court by its refusal to grant a writ of certiorari.' 7 Ind. Cl. Comm. at 137.

"The Supreme Court has made clear that no such inference is to be drawn from its denial of certiorari in any case."

The dissenting opinion supports this point by citing the following cases in which this point has been passed upon by this Court (R. 301, footnote 4):

"*United States* v. *Shubert*, 348 U. S. 222, 228-229; *Sunal* v. *Large*, 332 U. S. 174, 181; *House* v. *Mayo*, 324 U. S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403-404; *United States* v. *Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U. S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in *Darr* v. *Burford*, 339 U. S. 200, 226-228, where he stated at page 226:

> "'The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.
>
> • • • •
>
> "'Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner.'"

Clearly the dissenting opinion of Judge Littleton, concurred in by Judge Madden, is correct in its statement of the law on this point, and the Indian Claims Commission and the majority of the Court of Claims were in error.

CONCLUSION

For the reason set forth above we submit that the case should be reversed and remanded with instructions to the lower tribunals to follow the decisions of this Court holding that a fiduciary relationship does exist between the United States and the Indian tribes, in this case the Creek Nation; and with the further direction that they determine the issues in this case on the basis of the most exacting fiduciary standards; and with further direction to find facts which are essential to a proper disposition of these claims, and in accordance with the substantial evidence in the record.

Respectfully submitted,

THE CREEK NATION, Petitioner

PAUL M. NIEBELL

Attorney for Petitioner

APPENDIX

SECRET ARTICLES OF THE TREATY OF PEACE AND FRIENDSHIP

New York, August 7, 1790

George Washington, President of the United States of America and the Creek Nation of Indians

Additional secret articles to the Treaty of Peace and Friendship with the Upper Creeks, Lower Creeks, and the Semanolees

Typescript of MS, Unpublished Treaty, Archives No. 17, in U.S. Department of the Interior, Office of the Solicitor, *Statutory compilation of the Indian law survey: a compendium of Federal laws and treaties relating to Indians*. Edited by Felix S. Cohen, Chief, Indian Law Survey. Part 5: Indian Treaties (1778-1817). Mimeo. Washington. 1940.

Unpublished Treaty
Archives No. 17
August 7, 1790

GEORGE WASHINGTON
PRESIDENT OF THE
UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETINGS

WHEREAS the treaty of peace and friendship, between the United States of America and the Creek Nation of Indians made and concluded on the seventh day of the present month of August, Contains certain secret articles, which are in the form and words following:

SECRET ARTICLES OF THE TREATY OF PEACE AND FRIENDSHIP

Made and concluded on behalf of the United States of America on the one part, and the Creek nation of Indians on the other part in the City of New York, on this seventh day of August, one thousand seven hundred and ninety.

ARTICLE I.

The commerce necessary for the Creek nation shall be carried on through the ports, and by the citizens of the United States, if substantial and effectual arrangements shall be made for that purpose by the United States, on or before the first day of August one thousand seven hundred and ninety two. In the mean time, the said commerce may be carried on through its present channels and according to its present regulations.

And Whereas the trade of the said Creek nation is now carried on wholly or principally through the territories of Spain and obstructions thereto may happen by war or prohibitions of the Spanish government:

It is therefore agreed between the said parties that in the event of any such obstructions happening it shall be lawful for such persons as the President of the United States shall designate to introduce into and transport through the territories of the United States to the country of the said Creek nation, any quantity of goods wares and merchandise not exceeding in value in any one year Sixty thousand dollars, and that free from any duties or impositions whatsoever, but subject to such regulations for guarding against abuse, as the United States shall judge necessary; which privilege shall continue as long as such obstructions shall continue.

ARTICLE II.

The United States also agree to allow to each of the great medal chiefs herein after named, a commission, a great medal with proper ornaments, and each one hundred dollars annually for themselves and the other beloved men of their towns respectively, to wit:

Of the Upper Creeks	The Chiefs of the Oakfuskeos, Tuckabatchees, and the present Talissee King of the half-way house.
Of the lower Creeks	The Chiefs of the Cusitahs and Cowetas—AND—
Of the Semanolees	The Chief of Micasukee

ARTICLE III.

In order to effect a consolidation of the interests of the United States and the Creek nation, it is hereby stipulated that Alexander McGillivray the beloved Chief of the said nation shall also be constituted the Agent of the United States in the said nation with the rank of Brigadier General and the pay of one thousand two hundred dollars per annum, on his taking the usual oaths required by law.

ARTICLE IV.

And the said Alexander McGillivray hereby stipulates to use his highest exertions to endeavor to cultivate the firmest friendship between the United States and the said Creek nation.

ARTICLE V.

The United States agree to educate and clothe such of the Creek youth as shall be agreed upon, not exceeding four in number at any one time.

ARTICLE VI.

These secret articles shall take effect and be obligatory on the contracting parties as soon as the same shall have been ratified by the President of the United States, with the advice and consent of the Senate of the United States.

IN WITNESS of all and every thing herein determined between the United States of America and Alexander McGillivray in behalf of himself and the Creek nation, the parties have hereunto set their hands and seals, at the place and on the day and year above written.

In behalf of the United States,

H. KNOX, *Secy. of War and sole Commissioner for treaty with the Creek Nation.*

In behalf of himself, and the Creek Nation,

ALEXANDER M'GILLIVRAY

DONE IN THE PRESENCE OF

Richard Morris, Chief Justice of the state of New York. Richard Varick, Mayor of the City of New York. Marinus Willet. Joseph Allen Smith. Henry Izard.

Now Know ye, That I having seen and considered the said secret articles of the said treaty, do by and with the advice and consent of the United States accept, ratify, and confirm the same, and every article and clause thereof; In Testimony whereof I have caused the seal of the

United States to be hereunto affixed, and signed the same with my hand.

Given at the City of New York the Thirteenth day of August, in the year of our Lord, one
[SEAL] Thousand seven hundred and ninety, and in the Fifteenth year of the sovereignty and independence of the United States.

G. WASHINGTON
By the President:

T. W. JEFFERSON

By Command of the President of the United States of America.

H. KNOX

Secretary for the department of War.

Treaty of August 7, 1856, 11 Stat. 699, 2 Kapp. 756; Ratified August 16, 1856; Proclaimed August 28, 1856.

"Art. V. The Creek Indians do hereby absolutely and forever quit-claim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individual thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five

hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety, the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith-shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural operations under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five; one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon-maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. * * * The right and interest of the Creek Nation and people in and to the matters and things so excepted, shall continue and remain the same as though this convention had never been entered into."

"Art. VI. In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the

first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * *.

* * * *

"Art. XXVI. This convention * * * shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States."

Treaty of June 14, 1866, 14 Stat. 785, 2 Kapp. 931; Ratified July 19, 1866; Proclaimed August 11, 1866.

Article XI. The stipulations of this treaty are to be a full settlement of all claims of said Creek Nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called Confederate States; and the Creeks hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Creek Nation by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek Nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings of fact (R. 264–273) and opinion (R. 273–283) of the Indian Claims Commission are reported at 7 Ind. Cl. Comm. 117. The opinion of the Court of Claims (R. 292–315) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961 (R. 292). The petition for a writ of certiorari was filed on May 29, 1961, and was granted on October 9, 1961 (R. 315; 368 U.S. 811). The jurisdiction of this Court rests on 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1054, 25 U.S.C. 70s(c).

STATUTE AND TREATIES INVOLVED

Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C. 70a, reads as follows:

> Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all

other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. section 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment

> and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

The pertinent portions of the five treaties between the United States and the Creek Nation upon which the claims in the present case are based are set forth in Appendix A to this brief, *infra*, pp. 47–55.

QUESTION PRESENTED

Whether, in a suit by an Indian tribe against the United States to recover amounts which the latter allegedly had failed to pay the tribe under certain treaties, the burden is on the United States to show payment by proving that sums actually paid to the tribe were in fact allocated to the discharge of particular treaty obligations; or whether, as the Indian Claims Commission and the Court of Claims held, the burden is on the tribe to prove non-payment.

STATEMENT

Petitioner, the Creek Nation, brought this action before the Indian Claims Commission to recover amounts allegedly due under certain provisions of five treaties betweeen it and the United States (R. 1–6). These treaties, executed between 1802 and 1856, imposed upon the United States obligations to make payments and to provide goods and services to petitioner, which, petitioner alleged, had not been completely fulfilled by the United States. In answer (R. 7–14), the United States asserted that it

had fulfilled all the obligations in question and denied indebtedness to the petitioner in any amount (R. 8, par. 6). The United States also asserted several other defenses, among them *res judicata* (R. 7, par. 2) and release (R. 9, par. 11), but the Indian Claims Commission found it unnecessary to consider these defenses because of its decision on the merits (R. 282).[1]

To support its claims, the petitioner relied principally upon a report which the General Accounting Office had prepared for use in an earlier suit brought by petitioner against the United States, *Creek Nation* v. *United States*, No. H-510, 78 C. Cls. 474.[2] In this report, the General Accounting Office attempted to list all treaty obligations to the Creek Nation and all payments on such obligations. Because of the inadequacy of records during the first part of the nineteenth century, however, and because of the difficulties involved in paying funds to refugee Indians during the Civil War, the General Accounting Office was unable to attribute certain specific payments to particular treaty obligations (R. 24–26, 122). For example, in Section T of Part III of the G.A.O. Report (R. 122–129), concerning disbursements made between 1811 and 1834 not attributable to particular treaties, the G.A.O. states in its introductory discussion (R. 122):

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[1] Accordingly, these defenses are not discussed in this brief; they are reserved in the event that the cause is remanded.

[2] No. H-510 was one of several units brought under the special jurisdictional Act of May 24, 1924, 43 Stat. 139, as amended (see R. 7, Par. 2).

> An examination of the records of the General Accounting Office discloses that during the years from 1811 to 1834, certain disbursements were made by the United States for the benefit of the Creek Nation of Indians for purposes stipulated in various treaties with said nation, which, due to the lack of sufficient data, could not be identified as having been disbursed in fulfillment of any particular treaty. Therefore, no attempt has been made to allocate said disbursements under specific treaties, but they have been set out in this report in order to show as completely as possible all disbursements made by the United States pursuant to treaties with the Creek Nation of Indians.

The United States contended that the disbursements shown in Section T should be credited against treaty obligations in force from 1811 to 1834, whereas petitioner insisted that only when the G.A.O. Report attributed specific payments to particular treaty provisions could the United States be credited for fulfillment of its treaty obligations. Petitioner's claims were therefore for the difference between the amounts allocated in the G.A.O. Report to particular treaties and the total amounts petitioner alleged to be due under these treaties. A detailed explanation of the structure of the G.A.O. Report and the accounting and reporting problems involved in that Report may be found in Appendix B, *infra*, pp. 56–61.

The Indian Claims Commission found that "[t]here is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged" (Fdg. 10, R. 273), and dismissed the case. The Commission stated (R. 277):

> Both parties make many and varying contentions as to the items of charge and credit involved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor. [Emphasis by the Commission.]

The Commission rejected the petitioner's contention that the treaty claims it was asserting arose out of a relationship of guardian and ward, and found that such relationship "has not been established by competent or relevant evidence" (Fdg. 3, R. 265). It stated (R. 280) that this case "only involves the relationship of ordinary debtor and creditor"; that under such a relationship one who alleges non-payment has the burden of proving it; and that the petitioner "has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had" (R. 282).

The Court of Claims, "being in agreement with the disposition of the case made by the Indian Claims Commission," affirmed the judgment of dismissal (R. 292). Judges Littleton and Madden, dissenting,

were of the view that "the relationship between the United States and an Indian Tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties" (R. 297), and that the government had failed to sustain that burden.

The claims brought under the five treaties, the evidence presented, and the disposition by the Indian Claims Commission may be summarized as follows:

1. THE TREATIES OF 1802 AND 1805

In return for the cession of lands described in Article I of the Treaty of June 16, 1802, 7 Stat. 68 (see App. A, *infra*, pp. 47–48), the United States agreed in Article II to pay—

> * * * annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, * * * and also twenty-five thousand dollars in the manner and form following, viz: Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; * * * five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States * * *.

The Treaty became effective on January 11, 1803, the date of its proclamation by the President. The $3,000 annuity remained in effect from 1803 through

fiscal year 1902, when the permanent annuities of the Creek Nation were funded pursuant to the Act of May 27, 1902, 32 Stat. 245 (R. 22, 118, 119, 266), a period of 100 years. The Creek Nation has eliminated from this suit any claim for annuity payments due during the Civil War period, or for fiscal years 1862 through 1867, this period being covered in another suit before the Indian Claims Commission (R. 266, fn.; see Third Defense, R. 8–9).

The parties agreed that $317,000 was the amount of the obligation of the United States under the 1802 Treaty (R. 266), and petitioner admitted the disbursement to it of $254,690.25 (R. 267; see Pet. Br. 8). This amount was derived from figures specifically shown by the G.A.O. Report to have been paid pursuant to the 1802 Treaty (R. 45–49, 119; see Pet. Br. 8), plus the $10,000 worth of goods, receipt of which was acknowledged in the Treaty. Subtracting the $254,690.25 admittedly disbursed from the original obligation of $317,000, petitioner claimed that $62,309.75 was still due under the 1802 Treaty (R. 267; Pet. Br. 9).

In Article III of the Treaty of November 14, 1805, 7 Stat. 96 (see App. A, *infra*, p. 48), the United States agreed to pay—

> * * * annually * * * for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry * * *; and eleven thousand dollars shall be paid in like manner, annually, for the terms of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest. * * *

The total obligation of the United States under this article amounted to $206,000.00. On the basis of the G.A.O. Report (see R. 50), the Indian Claims Commission noted that, although the full $206,000 was appropriated, disbursements of only $169,452.25 could be definitely allocated to fulfillment of the obligations of this treaty (R. 269). Petitioner therefore claimed that $36,547.75 still remained unpaid under the 1805 Treaty (see Pet. Br. 10).

From the G.A.O. Report (R. 23–24, 127–129), the Indian Claims Commission found that an additional $99,461.45 had been disbursed to the Creek Nation between the years 1803 and 1818 "which the General Accounting Office cannot definitely and clearly identify as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805" (R. 267–269).[3] The Commission found further (Fdg. 5, R. 268–269) that the unallocated disbursement of $99,461.45 exceeded the amounts petitioner claimed were still due under the Treaties of 1802 and 1805 since the $62,309.75 petitioner claimed under the 1802 Treaty and the $36,547.75 claimed under the 1805 Treaty added up to only $98,857.50 (see Pet. Br. 11).

In addition to the G.A.O. Report, the United States introduced a considerable bulk of receipts, letters, reports, etc., showing specific disbursements in the Creek country, which it claimed were in discharge of

[3] With respect to specific payments due under the Treaty of 1802 for the years 1805 to 1811, inclusive, Section C of Part III of the G.A.O. Report (R. 41–49) states (R. 41): "Due to the incompleteness of the records covering said years, it cannot be definitely stated that said sum is the total disbursed pursuant to said treaty for said years."

the obligations under the 1802 and 1805 Treaties (R. 201–249). See, *e.g.*, letter of 1809 stating receipt of "Invoices of the annual stipend to the Creeks for this year" (R. 223). The Commission made no finding concerning this evidence.

2. THE TREATY OF 1832

The Treaty of March 24, 1832, 7 Stat. 366 (App. A, *infra*, p. 49), contained several provisions creating obligations of the United States. The only one upon which a claim was based appears in Article XIII:

> Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. * * *

The total obligation for the 20 years was therefore $60,000. But Article IV of the Treaty of January 4, 1845, 9 Stat. 821, as amended, provided for an additional educational annuity of $3,000, and extended the $3,000 annuity available under the 1832 Treaty to 1864, thus increasing the 1832 obligation to $99,000. Moreover, in Article V of the Treaty of August 7, 1856, 11 Stat. 699 (App. A, *infra*, pp. 51–53), the Creek Nation released the United States from all but certain specified obligations. One of the obligations continued (although no arrearages were preserved) was the $6,000 annually for education promised in 1845 Treaty.

The evidence bearing on the issue of fulfillment of the Treaty of 1832 before 1835 is meagre. The United States introduced evidence that it had been

willing and prepared to fulfill its obligation to educate Creek children by sending them to the Choctaw Academy, but that the Creeks had refused to furnish the youths to be educated (Ex. 154–156, R. 249–255). Because of the Creeks' refusal to cooperate, the United States was unable to perform its annual obligation fully before 1835, although it did disburse $157.50 in 1832, $502.50 in 1833, and $1,863.48 in 1834 in an effort to fulfill this obligation (R. 59). The United States contended that it was not required to do more and that it had no obligation to petitioner for the years 1832, 1833, and 1834. The Indian Claims Commission made no specific finding on this issue.

Statement No. 24 in the G.A.O. Report (R. 56–58), setting forth the disbursements pursuant to the 1832 Treaty, shows that $49,938.99 was paid out for education under Article XIII up to 1851 (R. 58). The year 1851 would have been the last year in which the educational annuity under Article XIII would have been due, had the annuity not been extended by the Treaty of 1845 (see *supra,* p. 11). The appropriations table for the Treaty of 1832 (R. 134) shows a decrease of $3,000 in the 1852 appropriation, and the table for the Treaty of 1845 (App. C, *infra,* p. 63) shows an increase of $3,000 a year from 1852 to 1864. Disbursement Schedule No. 86 (R. 93–96) shows that $60,673.23 was disbursed under the 1845 Treaty from 1852 to 1861.[4] For that 10-year period,

[4] The $77,422.51 total appearing at the end of Disbursement Schedule No. 86 includes amounts paid before 1852, which are attributable only to the 1845 Treaty.

$60,000 would have been due, $30,000 under the new obligation created in the 1845 Treaty and $30,000 under the obligation created in the 1832 Treaty as extended by the 1845 Treaty. If half the money paid out between 1852 and 1861 be attributed to the 1831 Treaty, $30,336.11 should be added to the amount disbursed under that Treaty.

On July 10, 1861, petitioner entered into a treaty with the Confederate States of America (C.S.A. Provisional Government, Stats. (1861–1862), pp. 289, 297–299), in which the Confederacy assumed obligations of the United States to the Creek Nation, including the $6,000 educational annuity of the 1845 Treaty. The United States introduced several exhibits (Nos. 159–177), some of which are reproduced in the record (R. 257–264), to prove that the Confederacy did in fact pay the federal obligations it assumed, including the $12,000 due for 1861 through 1864 under the 1832 Treaty as extended (see Ex. 168, R. 259). The Indian Claims Commission made no specific finding on this evidence.

While the Confederacy was paying the Indian tribes adhering to it during the Civil War, the United States was making payments for the relief of refugee Indians from appropriations to fulfill Creek treaties in force during the Civil War years. Statement No. 4 (R. 33–34) shows that $343,501.17 was disbursed between 1862 and 1867, and this amount exceeds the total obligations in force during the war period, including the Treaty of 1845 and the Treaty of 1832 as extended. The disbursement of monies appropriated for several tribes to

individual refugee Indians in Kansas and Oklahoma made accounting very difficult, but Statement No. 4 is an effort to show what happened to the Creek appropriations. The Creek refugees were also helped with money appropriated for other tribes, as is explained in the G.A.O. Report (R. 26).

Before the Indian Claims Commission, petitioner stated that the Treaty of 1832 created an obligation of $60,000, that the United States had paid only $49,938.99 on it, and that the United States therefore still owed $10,061.01 (see R. 4, par. VI). The United States took the position that the Treaty of 1832, as extended by the Treaty of 1845, was in effect from 1832 to 1864, and created a total obligation of $99,000. It contended that it had been absolved from any obligation for 1832, 1833, and 1834 because of the petitioner's refusal to furnish youths to be educated and that the over-all obligation was thus reduced to $90,000. It also contended that it was not liable for any arrearages prior to 1856 because the Treaty of 1856 had released all debts not specifically reserved and had not reserved any arrearages on the 1832 Treaty. The United States claimed to be entitled to the following credits against the 1832 Treaty obligations:

Disbursements up to 1851	$49,938.99
One-half of disbursements 1852–1861 under 1845 Treaty	30,336.11
Unallocated disbursements in 1832 and 1834	2,662.67
Confederate disbursements	12,000.00
	$94,937.77

The United States also asked that $12,000 of the disbursements to refugee Creeks during the Civil War be credited to the 1832 Treaty.

The Indian Claims Commission's finding on the 1832 Treaty, after stating the effect of the subsequent treaties, concluded with this paragraph (R. 270):

> The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's Ex. 185, 186) in fulfillment of the obligations of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

3. THE TREATY OF 1833

Petitioner's fourth claim was based on the following provisions of Article V of the Treaty of February 14, 1833, 7 Stat. 417 (see App. A *infra*, pp. 50–51):

> * * * [T]he commissioners * * * agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagon-maker, as soon as they may be required by the nation, in addition to those already em-

> ployed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians * * *.

Petitioner alleged that the United States had acknowledged $2,710 a year to be due under these provisions (R. 5). It based its claim on a 39-year period, 1834 through 1878[5] less the six Civil War years, and so claimed that it was suing on a total obligation of $105,690.00. Petitioner admitted that $76,285.45 of this amount had been paid (see Statement No. 30, R. 73)[6] and claimed there was a deficit of $29,404.55 (R. 271). Petitioner concluded that the government had acknowledged an annual obligation of $2,710 from the fact that that sum was almost always the amount appropriated by Congress for the 1833 Treaty (R. 135–136). Petitioner points in particular to the itemization in the appropriation made in the Act of June 17, 1844, 5 Stat. 704, 706, which showed $840 for a blacksmith and assistant, $270 for iron and steel, $600 for a wagonmaker, and $1000 for education (Pet. Br. 22).

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[5] It is not clear from the record why petitioner terminates the claim in 1878. Congress quit appropriating money under this Treaty in that year (R. 135–136).

[6] Statement No. 30 shows a total disbursement of $84,529.03, but this includes amounts which cannot be credited against petitioner's claim.

The United States denied that any amount had been fixed for the obligation under this Treaty, certainly not before 1856, and further denied that any definite term could be fixed for the discharge of any obligations under the Treaty. The government pointed out that the Treaty made commencement of the services of the artisans conditional upon the petitioner's need and placed the education allowance in the discretion of the President; and that it also specified that both were to continue as long as the President saw fit to continue them. Inasmuch as the Treaty itself did not define the amount or term of the government's obligation, the United States contended that petitioner was obliged to prove the amount of its loss attributable to alleged non-performance by the United States.

The United States also presented argument and evidence to prove fulfillment of its obligations under the 1833 Treaty, but because of the Commission's finding with respect to this Treaty, it is necessary here only to describe this evidence generally. First of all, the government argued that the annual expenditure under this treaty could not have been as high as contended by petitioner because of statutory limitations on the salaries of persons working with the Indians. See the Act of June 30, 1834, 4 Stat. 735. These figures were changed by the Treaty of August 7, 1856, 11 Stat. 699, necessitating a division of obligations under this Treaty into pre-1856 obligations and post-1856 obligations. In further defense, the United States pointed out that, in the Treaty of 1856, the Creek Nation reserved its right to future and

continued payment for education and services under the Treaty of 1833, but it did not reserve any claim to sums unpaid, any right to the value of services not performed, or any claim to damages for failure to perform the services prior to August 7, 1856. Moreover, according to the government's evidence, the obligations which the 1856 Treaty continued were assumed and paid by the Confederacy. Finally, the government claimed credit for the amounts appropriated pursuant to the 1833 Treaty and disbursed for the relief of refugee Creeks during the Civil War.

With respect to the 1833 Treaty, the Indian Claims Commission found (R. 271–272):

> There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there any evidence of any demand having been made by petitioner for services or equipment not supplied.

4. THE TREATY OF 1856

Petitioner's fifth claim is based on the following provision of Article VI of the Treaty of August 7, 1856, 11 Stat. 699, 701 (App. A, *infra*, pp. 53–55):

> * * * [T]he United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks * * *.

Petitioner's claim under this provision was for the period from 1857 through 1861 (R. 6). It claimed that, although Congress had appropriated $10,000 for each of these years (R. 137–138), the G.A.O. Report showed disbursements of only $21,000 of that $50,000 (R. 103), and that therefore the alleged deficit was $29,000.00.

In its defense against this claim, the United States again relied on payments made during the Civil War by both the Confederacy and the United States. The $29,000 deficit was one of the obligations specifically assumed by the Confederacy in its treaty with the Creeks (C.S.A., Provisional Government, Stats. (1861–1862), pp. 289, 297–299 (Def. Ex. 159, R. 256–257)). The Confederacy appropriated this money (Def. Ex. 160, R. 257) and paid it (Def. Exs. 167, 168, 169, 170, 173, R. 258–263). Moreover, the United States continued to appropriate the $10,000 a year throughout the Civil War, and these appropriations were disbursed for refugee Indians (R. 33–34).

In its finding on the 1856 Treaty, the Indian Claims Commission concluded (R. 272):

> The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166–170, 173).
>
> The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).

SUMMARY OF ARGUMENT

I

A. Petitioner bases its claims on the theory that a general fiduciary relationship exists between the United States and the Creek Nation resembling that of a guardian to its ward, and that under such relationship the burden is on the United States, when its performance of treaty obligations is questioned, affirmatively to establish that it has fulfilled such obligations. Whether or not the relationship of guardian and ward exists between the two parties, however, depends upon the express provisions of the particular treaties or acts under which the claims are brought, and not upon any general fiduciary principle. In *Creek Nation* v. *United States*, 318 U.S. 629, petitioner brought its claims on the same theory it invokes in the present case, but the Court refused to impose upon the United States the duties of a guardian in relation to treaties which did not impose that obligation.

B. Congress intended the Indian Claims Commission to determine claims on the basis of the specific relationship created by the treaties under which the claims are brought and not on the basis of a general fiduciary relationship. Despite opposition, the House passed the Indian Claims Commission bill with a provision which required the Commission, when determining claims, to apply the same principles of law as would be applied to an ordinary fiduciary. Opposition to this provision was renewed when the measure was before the Senate, and the latter eliminated the provision from the bill, on the ground that the Commission should determine the degree of fiduciary duty on

a case-to-case basis. As finally passed, the bill did not contain the fiduciary provision.

C. In the present case, the Indian Claims Commission properly determined petitioner's claims on the basis of the specific relationship established by the five treaties under which petitioner brought its claims. None of those treaties created fiduciary duties or relationships by their express terms. The Commission correctly found that the relationship created was not one of guardian and ward, but rather that of creditor and debtor. The burden was therefore on petitioner to prove its claims.

II

Whether or not a guardian-ward relationship existed between the United States and the Creek Nation, the legislative history of the Indian Claims Commission Act indicates clearly that Congress never intended to impose upon the United States the heavy burden of proof which petitioner contends is mandatory; it rather intended that Indian tribes prove their claims. Congress was fully aware of the difficult evidentiary problems resulting from the age of most Indian claims and the deterioration of the government's old Indian records. It therefore hardly intended the United States to assume the burden of having its eighteenth and nineteenth century transactions tested by twentieth century accounting standards. The onerous standards of accountability which petitioner seeks to impose upon the United States have never been applied by this Court. The burden, in the last analysis, rests upon petitioner to prove its claims. Petitioner here failed to sustain that burden.

ARGUMENT

INTRODUCTION

The petitioner seeks to recover amounts which the government was obligated to pay under five treaties (all more than 100 years old), but which the government allegedly failed to pay. The theory of petitioner's case is that the relationship between an Indian tribe and the United States is that of ward and guardian; that, under such relationship the burden is on the United States, whenever it is claimed that the latter has failed to perform its treaty obligations, to prove affirmatively that it has done so; and that the government has here failed to sustain that burden because the records of payments to the tribe did not specifically show the allocation of all of the payments to particular treaty obligations. Petitioner seeks to recover the difference between the total treaty obligations and the total payments which were specifically allocated to such obligations.

Petitioner's argument rests on a basic misconception. The relationship between an Indian tribe and the United States is frequently described loosely as that of ward and guardian. But the determination of whether, and to what extent, the government has assumed fiduciary duties with respect to particular claims depends upon the particular treaties and statutes under which those claims arise. In the present case, the five treaties under which petitioner's claims are asserted did not create any relationship of guardian and ward between the United States and the petitioner with respect to the subject matter of such

claims. The Indian Claims Commission thus correctly ruled that, as to such claims, the relationship between the United States and the petitioner was merely that of debtor and creditor, and that petitioner's failure to sustain its burden of proof that the United States had not made the payments required by the treaties was fatal to its case.

I

THE TREATIES UNDER WHICH PETITIONER BROUGHT ITS CLAIMS DO NOT CREATE A GUARDIAN-WARD RELATIONSHIP BETWEEN THE PARTIES BY VIRTUE OF WHICH THE UNITED STATES HAS THE BURDEN OF MAKING A PRECISE ACCOUNTING FOR TREATY OBLIGATIONS OVER A CENTURY OLD

A. WHETHER OR NOT THE RELATIONSHIP OF GUARDIAN AND WARD EXISTS BETWEEN THE UNITED STATES AND AN INDIAN TRIBE DEPENDS UPON THE EXPRESS TREATY PROVISIONS APPLICABLE TO EACH TRANSACTION AND NOT UPON A GENERAL FIDUCIARY PRINCIPLE

Petitioner's case rests on an uncritical application of the general principle that "a fiduciary relationship does in fact exist between the United States and the Indian tribes, the Creek Nation in this case, and that this relationship resembles that of guardian and ward" (Pet. Br. 41). From this principle, petitioner draws the conclusion that "the United States, as the fiduciary, has the burden of making a clear and precise accounting to petitioner for the payments it made under its treaty obligations * * *" (Pet. Br. 51–52), and "ha[s] the burden of proving the credits it claim[s] against the specific balances shown by its own accounting report to be due the Creek Nation under the treaty obligations in issue" (Pet. Br. 54).

To state that a general fiduciary relationship exists between the United States and the Indian tribes in the nature of guardian to ward, however, does not automatically answer the specific question whether the Creek Nation is entitled to judgment. It will hardly do to assimilate the "ward" status of an Indian tribe to the status of ward at common law or to make it synonymous with the status of a "cestui que trust." See Felix S. Cohen, *Handbook of Federal Indian Law*, pp. 169, 172 (1942). Although an Indian tribe in its relationship to the United States resembles a ward in its relationship to its guardian in the political context of the tribe as a "domestic dependent nation * * * in a state of pupilage" (*Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; see *United States* v. *Kagama*, 118 U.S. 375; *United States* v. *Payne*, 264 U.S. 446; Cohen, *supra*, p. 170), in other contexts, "wardship" may have a variety of connotations (see *id.* at 170–173).

The decisive factor in each case is not what effect the general fiduciary relationship of the United States as guardian to the Indian tribes has, but rather what effect the specific relationship of the two parties, as created by the specific treaty or act, has to the claim presented. In *Creek Nation* v. *United States*, 318 U.S. 629, petitioner brought its claims on the same guardian-ward theory it invokes in the present case, but the Court refused to impose upon the United States the duties of a guardian in relation to treaties which did not themselves impose that obligation. The Court determined the nature and extent of the government's duties to the tribe on the basis of the

particular relevant transactions. The Court stated (*id.* at 640):

> We are asked here to impose a liability on the government to these Indians for wrongs allegedly committed against the Indians by others. Appreciating the desire of Congress to recognize the "full obligation of this nation to protect the interests of a dependent people," *Tulee* v. *Washington*, 315 U.S. 681, 685, we are unable to find in the words of the treaties or statutes upon which this action rests any such prodigal assumption by the government of other people's liabilities as that for which the petitioners contend here.[7]

Similarly, in *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555, 560, the Ninth Circuit stated: "The Federal-Indian relationship has many times been said to resemble that of guardian and ward. However, in the absence of some specific language to that effect in the treaty, the legal obligations of a true guardianship do not prevail." The Court of Claims has also rejected the "guardian-ward" theory as a general principle. In *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780 (C. Cls.), the court noted that "[w]hether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends * * * upon the express provisions of the particular treaty * * * under which the claim presented arises." This principle was graphically

[7] It is noteworthy that the reliance on the *Creek Nation* case in the dissenting opinion below (R. 302, fn. 6) is in reality a reliance on Justice Murphy's dissent in *Creek Nation*, 318 U.S. at 642.

illustrated in *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498–499, where the court explained:

> * * * [P]laintiffs' cause of action is predicated upon the common law liabilities pertaining to the relationship of guardian and ward. No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language, and the court must deduce liability from the relationship of the parties if judgment is awarded, and not from treaties or acts of Congress.
>
> * * * * *
>
> The Congress has, in innumerable special acts * * *, limited the jurisdiction of the court to the ascertainment of the legal liability of the Government * * *, and no precedent exists which would authorize the court to extend the meaning of the terms used so as to comprehend a right to sue thereunder on the theory that as a matter of general law the Government because of treaties and acts of Congress becomes responsible as guardian of the Indians. * * *

Accord, *Kansas or Kaw Indians* v. *United States*, 80 C. Cls. 264, 301–302, certiorari denied, 296 U.S. 577; *Sioux Tribe of Indians* v. *United States*, 146 F. Supp. 229, 237 (C. Cls.).

From these cases, it is evident that the courts have referred to what Congress has done, both in entering into agreements with the Indians and in carrying them out, in order to determine the exact relationship between the United States and the Indian tribe in any given situation, rather than determine the relationship on the basis of a general all-embracing principle. In each case "it rests with Congress to determine when and in what manner the special relationship

* * * [*e.g.*, "guardianship" or "trusteeship"] shall attach, and when it shall cease." United States Department of the Interior, *Federal Indian Law*, p. 557 (1958).

B. CONGRESS INTENDED THE INDIAN CLAIMS COMMISSION TO DETERMINE CLAIMS ON THE BASIS OF THE SPECIFIC RELATIONSHIP CREATED BY THE TREATIES UNDER WHICH THE CLAIMS ARE BROUGHT AND NOT ON THE BASIS OF A GENERAL FIDUCIARY RELATIONSHIP

The legislative history of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70–70v, indicates that Congress did not intend the Commission to determine claims on the basis of any general fiduciary relationship between the United States and the Indian tribes; rather the Commission was to determine in each particular case whether the United States was under a specific fiduciary duty to each plaintiff, and, if so, what the extent of that duty was.

1. In March 1945, the House Committee on Indian Affairs began hearings on two bills to create an Indian Claims Commission. Neither bill made reference to any guardian-ward or fiduciary relationship between the United States and the Indian tribes. See Hearings on H.R. 1198 and 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., pp. 1–8. Although there were occasional references throughout the hearings to such a relationship (*id.* at pp. 13, 26, 31–32, 86), there was no effort to define it.

Joseph C. McCaskill, Assistant Commissioner of the Bureau of Indian Affairs, testified (*id.* at p. 74) that a jurisdictional act for the Menominees (probably

the Act of Sept. 3, 1935, Sec. 3, 49 Stat. 1085*) directed the Court of Claims "to apply to the Government the same standards of performance that would apply to a trustee," and assumed that each proposed bill "is flexible enough that the Commission might if it wished apply such standards and demand of the Government the same kind of performance that it would require of a private trustee." At a later session, Mr. Ernest L. Wilkinson, representing several tribes, recommended as an amendment to Section 2 of each bill (Hearings on H.R. 1198 and 1341, *supra* p. 89), that "in the determination of any case prosecuted hereunder, the United States shall be held to the same standards of care as an ordinary fiduciary." Moreover, when the Department of the Interior submitted its proposed amendments to the two bills, it added the following clause to Section 2 of each bill (*id.* at p. 116): "The Commission, in determining whether a claimant is entitled to relief on legal grounds, shall apply with respect to the United States the same principles of law as would be applied to an ordinary fiduciary." In the discussion of the Department's proposals, it was noted that the Department's and Mr. Wilkinson's recommendations on the fiduciary clause were practically the same (*id.* at p. 128).

2. Ultimately, a new bill (H.R. 4497, 79th Cong., 1st Sess.), embodying many suggestions including the fiduciary provision proposed by the Department of

**Menominee Tribe* v. *United States*, 101 C. Cls. 10, and *Menominee Tribe of Indians* v. *United States*, 102 C. Cls. 355, relied on in the dissenting opinion below (R. 302, fn. 6, R. 303), were suits brought under this jurisdictional act.

the Interior, was reported to the House in December 1945. H. Rep. No. 1466, 79th Cong., 1st Sess. The report explained the greatly varied nature of Indian claims and the desirability and necessity of having a tribunal which could adjudicate them (*id.* at p. 4). The Committee found no reason to deny the Indians a forum to determine whether the United States had fulfilled its obligations to them even though the claims dated back many years, for, as the Committee stated (*id.* at p. 5): "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States." Subsequently, in discussing the Commission's jurisdiction under the sixth classification of claims allowed under the bill, namely (*id.* at p. 10), "claims of whatever nature which would arise on a basis of fair and honorable dealings, even though not recognized by any existing rule of law or equity," the Committee stated (*id.* at p. 12):

> * * * This extension of jurisdiction is believed to be justified by reason of the fact that we have always treated the Indian tribes as non sui juris and have set ourselves up as their guardians. In this relationship many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts * * *.

3. Opposition to the general fiduciary provision developed during the House debate on the bill. See 92 Cong. Rec. 5309–5323. Letters from the Comptroller General and the Attorney General, both of whom op-

posed its passage, were inserted in the Congressional Record (*id.* at 5309–5311). The Comptroller General referred to the fiduciary provision as objectionable (*id.* at 5310). Attorney General Clark spelled out his objections to the fiduciary provision (*id.* at 5311):

> * * * The justification for such a provision is not apparent, for if the claim is one based upon legal grounds the Commission ought to determine, according to principles of law, just what fiduciary duty, if any, existed with respect to the claim against the United States and not be compelled to treat the United States as an ordinary fiduciary when it was in fact under no such duty.

The House never specifically considered the objections and passed the bill with the fiduciary provision.

4. The Department of Justice, in testimony by Mr. J. Edward Williams and written comments by Attorney General Clark, renewed its objection to the general fiduciary provision in the Senate Hearings on the bill. See Hearings on H.R. 4497 before the Senate Committee on Indian Affairs, 79th Cong., 2d Sess., pp. 17, 26. The Senate Committee eliminated the fiduciary provision. See S. Rep. No. 1715, 79th Cong., 2d Sess. Attorney General Clark's letter was printed as part of the Senate Committee report. The Senate accepted the Committee's amendments and passed the bill as amended. See 92 Cong. Rec. 9217–9219.

In conference, the House managers agreed to the elimination of the fiduciary provision. See H. Rep. No. 2693, 79th Cong., 2d Sess. The House managers in their report explained that the conferees had

"agreed to the elimination of this [fiduciary] provision because it is now well settled that without express language the United States owes a very high degree of fiduciary duty to Indian tribes * * *" (*id.* at p. 6).[9]

The Senate Committee in its report had stated as its reason for eliminating the fiduciary provision that "the Commission should be permitted to determine according to the usual principles of law whether the Government was a fiduciary in the particular case involved, and if so what fiduciary duties were imposed upon it." S. Rep. No. 1715, *supra*, p. 6.

C. THE RELATIONSHIP BETWEEN THE PARTIES UNDER THE TREATIES INVOLVED IN THE PRESENT CASE WAS MORE AKIN TO CREDITOR AND DEBTOR THAN TO GUARDIAN AND WARD

In the present case, the Indian Claims Commission, pursuant to its statutory mandate, properly determined petitioner's claims, not on the basis of any general fiduciary relationship between the parties, but

[9] The conferees also cited Section 24 of the bill which provided "[t]hat nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups." H. Rep. No. 2693, *supra*, p. 6. Section 24, although not part of the original bills, was a part of the bill which passed the House; the Senate did not amend it. Section 24 provides for suits on Indian claims arising after the cut-off date for suits pursuant to Section 2 (*supra*, pp. 2–4). By the Act of May 24, 1949, 63 Stat. 102, Section 24 was transferred to the Judicial Code as 28 U.S.C. 1505. The proviso quoted above was "omitted as unnecessary since the provision conferring jurisdiction cannot in any view alter the relationship of the Government with its Indians." H. Rep. 352, 81st Cong., 1st Sess., p. 15; see 28 U.S.C.A. 1505.

on the basis of the specific relationship established by the five treaties under which petitioner brought its claims. In alleging that the United States must make an accurate and precise accounting to petitioner of all the disbursements made pursuant to treaty obligations (Pet. Br. 51–52), petitioner attempted to use Article II of the Treaty of August 7, 1790, 7 Stat. 35, under which the Creek Nation acknowledged itself "to be under the protection of the United States of America" (Pet. Br. 42, fn.), as a basis for alleging that a guardian-ward relationship existed between the two parties in the present case (see R. 277, 280). But, as the Commission pointed out, petitioner made no claim under the 1790 Treaty (R. 280), and under the principle established in *Creek Nation* v. *United States, supra,* 318 U.S. at 640, any fiduciary relationship between the United States and the Indian tribe must be created by the specific treaty under which the claim is asserted.

Petitioner asserted that the treaties under which it was suing had created a fiduciary relationship and had set up trust funds which were to be held and administered by the United States for the use and benefit of the Creek Nation (R. 2, par. III; see R. 274). But none of the five treaty provisions upon which petitioner has based the present suit creates fiduciary relationships or duties by its express terms. Moreover, the obligations which petitioner claimed were unfulfilled were to be paid out of public funds rather than Indian trust funds. None of the provisions in the first four treaties (of 1802, 1805, 1832, and 1833) ever created a trust fund or segregated

any portion of the public moneys for use on petitioner's behalf. In fact, only the Treaties of 1805 and 1832 fixed definite limits to the government's obligations which would have made such a segregation of funds possible. Instead of creating trusts, the treaties imposed upon the United States simple contractual obligations to make certain payments to petitioner. Cf. *Quick Bear* v. *Leupp,* 210 U.S. 50, 81 (referring to treaty obligations as debts).

The only claim involved in this case which could be said to be related to a trust fund is that under the Treaty of 1856 (App. A, *infra,* p. 53), in which the United States agreed to invest $200,000 "in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks * * *." It is not clear from the record that $200,000 was ever used to purchase stocks, but this amount was included in the $999,368 appropriated by the Act of May 27, 1902, 32 Stat. 245, as commutation of the annuities due the Creek Nation (R. 98).[20] Be that as it may, petitioner's claim here concerns only the interest which the United States guaranteed would be paid. Since the government cannot guarantee that particular investments it may make will return a hoped-for rate of interest, the treaty obviously contemplated that the government would make up any difference between the

[20] The first full paragraph on R. 98 refers to an appropriation of $200,000 plus interest due under Article VI of the 1856 Treaty. This appropriation was to fulfill another provision of the article involved here.

actual return and the five percent out of public funds, and in fact the United States made annual appropriations for the full amount of the interest (R. 98, 137–138).[11] The interest obligation was therefore a simple debt. In any event, this obligation had been fully discharged (Fdg. 8, R. 272), so that speculation as to its nature is purely academic.

With respect to all the claims, the Commission noted, in examining petitioner's allegations, proposed findings and prayer (R. 274–277), that petitioner had consistently referred to "obligations," "indebtedness," and amounts "due and owing," rather than to "moneys it had received from or for the plaintiff, the management of which the defendant became trustee" (R. 274). Consequently, petitioner's suit was not for an accounting of the disposition of trust funds or for the breach of fiduciary duties, but rather involved the "relationship of ordinary debtor and creditor" (R. 280). The Indian Claims Commission was therefore correct in finding that "[t]he relation of guardian and ward as between the plaintiff and the defendant has not been established by competent or relevant evidence" (Fdg. 3, R. 265), and that the burden was on petitioner to prove its claims (see R. 277).

[11] The appropriations list on R. 138 is not complete because petitioner's claim applied only to deficits alleged to have occurred in the first few years after the treaty was entered.

II

CONGRESS INTENDED THAT, UNDER THE INDIAN CLAIMS COMMISSION ACT, THE BURDEN WOULD BE ON AN INDIAN TRIBE TO PROVE ITS CLAIMS; PETITIONER FAILED TO SUSTAIN THAT BURDEN

1. Whatever substantive fiduciary obligation the United States may have either by general principle or under the specific treaties involved in the present case, that obligation does not shift the burden to the United States to prove that it made specific disbursements to meet specific treaty obligations. The soundness of this proposition is demonstrated by the legislative history of the Indian Claims Commission Act.

The Indian Claims Commission bill as it passed the House had specified six classifications of claims which could be brought under it. The Senate had eliminated three of the classifications, but the conferees had reinserted two of those three (H. Rep. No. 2693, 79th Cong., 2d Sess., pp. 5–6)—

> * * * because they wanted to make sure that *if any tribal claimant could prove facts sufficient to make a case* under either of these classifications, the Commission would have authority to make an award to such claimant.
>
> * * * The reinsertion of this classification makes it plain that *where claimant can prove sufficient facts* within the language of this classification the Commission had full authority to award proper damages therefor. [Emphasis added.]

There is no reason to believe that this statement on the burden of proof under two of the classifications did not apply to the other classifications ultimately em-

bodied in the Act (see Section 2 of the Act, 25 U.S.C. 70a, *supra*, pp. 2–4).[12]

Moreover, when Congress created the Indian Claims Commission, it was fully aware of the difficult evidentiary problems which would confront the parties to suits before the Commission. The General Accounting Office had already made up a number of reports of the kind involved in the present case,[13] and the Department of the Interior had given the House Committee on Indian Affairs a list of over 150 suits in which G.A.O. reports had been submitted. See Hearings on H.R. 1198 and 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., pp. 166–175. One proponent of the bill stated that, in the preceding twenty years, the General Accounting Office had spent over $1,000,000 in reporting on Indian claims bills. 92 Cong. Rec. 5316. Secretary of the Interior Ickes explained why these reports

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[12] The two classifications of claims reinserted by the conferees were clauses 3 and 4 of Section 2 of the Act involving the revision of agreements and takings of land without payment of compensation. The present suit falls under clause 1, involving "claims in law or equity arising under * * * treaties of the United States * * *."

[13] In *Miami Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 580, 590, the Commission stated:

> We take judicial notice of the fact that at the present time, and for many years in the past, a whole section of the General Accounting Office staff consisting of approximately 80 persons has been and is now working on Indian Claims accounting made necessary by the Indian Claims Commission Act and previous jurisdictional acts authorizing the Court of Claims to adjudicate certain specific Indian claims against the United States. * * *

were so expensive (S. Rep. No. 1715, 79th Cong., 2d Sess., p. 3):

> At present, after long preliminary negotiation and lobbying, eventuating in a jurisdictional act, a petition is filed in the Court of Claims, and the General Accounting Office goes through all records of expenditures, accumulating as certain or possible set-offs the detailed record of all the gratuitous expenditures for or in behalf of each tribe. The Indian Office, simultaneously or subsequently, prepares a lengthy history and discussion of the case. While the General Accounting Office is working on one case, many others are waiting their turn because much of the data are contained only in a single, unduplicated series of badly worn-out records.

It was generally realized that many of the claims brought under the Act would be old.[34] But the House Committee stated that "even if there are some claims that have roots in 80- or 90-year old treaties, it is hard to understand why their age should deprive the aggrieved Indians of appropriate relief." H. Rep. No. 1466, 79th Cong., 1st Sess., p. 5.

Since Congress was aware of the age of most Indian claims and the deterioration of the government's old Indian records, it hardly intended the United States to assume the burden of having its eighteenth and nineteenth century transactions tested by

[34] Some Congressmen apparently did not realize just how old some claims would be, for there was some discussion of trying to adjudicate claims before the death of those Indians who had first-hand information and evidence. See Hearings on H.R. 1198 and 1341, *supra*, p. 28.

twentieth century accounting standards. Accounts kept by a semi-literate agent, writing with a quill by candle-light in a log cabin or tent in Indian country, will never compare to accounts kept on an electronic data-processing and accounting business machine, and there is no reason to believe that Congress thought otherwise. Congress created the Indian Claims Commission as a forum in which Indian tribes could have their claims adjudicated, not as a forum in which the government was simply to confess judgment. If petitioner's standards were to be applied to all past transactions, claimants would have nothing to do to recover but point out discrepancies in General Accounting Office reports; the government would be able to do nothing but admit liability.

In *Seminole Nation* v. *United States*, 316 U.S. 286, the Court refused to allow the Indians to recover on the ground of a technical accounting deficiency. In Item Three in that case, the tribe sought to recover money intended for the support of schools which had been promised in a treaty identical with the Treaty of 1856 in the present case. The Court held (316 U.S. at 292) that, since the Tribal Treasurer had annually disbursed more than enough to meet the obligation, "there is no need to inquire whether payment to that official was authorized. The schools actually received the benefit of the money. That satisfied the obligation of the Treaty and defeats recovery."

In *Miami Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 580, the plaintiff carried the theory of a right to a "general accounting" to its logical conclusion by, in effect, "demanding that the defendant,

in addition to making an accounting of all financial or monetary transactions connected with, or growing out of said treaties and statutes, search its files and records and furnish to the petitioners factual evidence which will enable them to state causes of action against it and prosecute them to a successful conclusion" (*id.* at 588). The Commission rejected the demand. After pointing out that 11 General Accounting Office reports had already been made and that Section 14 of the Indian Claims Commission Act, 25 U.S.C. 70m, provided in effect a discovery process of all evidence in the government file, the Commission concluded (*id.* at 590):

> That the work before this Commission is adversary in nature to a large extent and was so intended by Congress, is evidenced by the legislative history of the Act. General principles of law apply as is shown by the refusal of Congress to incorporate into the Indian Claims Commission Act a provision holding the Government to the strictest of fiduciary standards in every instance coming before us. Only where such standards are applicable under the general law and in a case where the facts justify it do they apply. Except to the express extent of making all records and data available to petitioners, we think the defendant owes the petitioners no greater duty in the preparation and presentation of their case than it would if the parties were ordinary litigants in any court of law.
>
> To hold otherwise would place upon the defendant an additional and unprecedented burden to the heavy one it now bears. * * *

2. Whatever may be the fiduciary relationship between the parties, the burden was in fact upon petitioner to prove its case. The onerous standards of accountability which petitioner seeks to impose upon the United States have never been applied by this Court. Rather, the Court has fashioned practicable solutions that would achieve a fair adjustment of the equities of a particular case.

An illustrative example is *Choctaw Nation* v. *United States,* 119 U.S. 1. There the Senate, under the provisions of a treaty, made an award to the Choctaw Nation to cover lands which the latter had lost because of the government's failure to adhere to a prior treaty with the Choctaws. In a subsequent suit by the Choctaw Nation against the United States, the Court of Claims treated the Senate award as of no effect, and granted the Choctaws a different amount. This Court, however, upheld and approved the award made by the Senate. Both it and the Senate recognized that the Choctaws were not receiving the same amount as they would have received had they sold the lands themselves, but the Court stated (119 U.S. at 35 (emphasis added)) that "the principle of settlement adjudged by the Senate in its award * * * furnishes the nearest approximation to the justice and right of the case that, *after this lapse of time,* it is practicable for a judicial tribunal to reach."

In the *Choctaw* case, the "lapse of time" was in fact relatively short. When the Senate passed its resolution in 1859 making the award, the first Choctaw treaty in question was not yet 40 years old, the main Choctaw treaty in question was not yet 30 years old,

and the last Choctaw treaty in question was only four years old. In the present case, more than a century later, petitioner adamantly ignores all practicalities of proof in connection with its claims, two of which even antedate the Choctow claims. If the standard in the *Choctaw* case was to be a practicable one rather than one imposing impossible criteria of accountability, surely the standard in the present case must at least be equally practicable.

Such a practicable standard was laid down in *Chickasaw Nation* v. *United States*, 103 C. Cls. 1, reversed on other grounds, 326 U.S. 217.[15] In that case, the first claim was that the United States had failed to fulfill a treaty obligation to pay an annuity of $3,000. In holding that the Chickasaws were not entitled to recover, the court found that Congress had made appropriations for the years in question and that goods of the right value had been forwarded from the War Department storehouse for the Chickasaws. The court held (103 C. Cls. at 35–36):

> * * * It must be presumed that they were received in due course. To require the defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. The burden is upon the plaintiff to prove its case. While the jurisdictional act waives the "lapse of time," it does not thereby

[15] The fact that the Commission erroneously stated the effect of the denial of certiorari on one point (see R. 278–281) does not detract from the principle laid down by the Court of Claims in the *Chickasaw* case.

> shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff.
>
> It must also be presumed that the goods forwarded were paid for out of the appropriations made in fulfillment of the supposed treaty or agreement. The Government's accounts are not complete in that respect, but it may not be assumed that the Government paid for the goods without appropriation. Counsel do not invite attention to any other appropriations.

Similarly, under the circumstances of the present case, petitioner had the burden of proving its claims, but failed to do so. The General Accounting Office Report showed all the financial facts, and the government offered other supporting material from the National Archives, from printed compilations of government documents, and from texts on Indian history. Indeed, petitioner presumably would never even have filed its claims had it not been for the availability of the G.A.O. Report. Moreover, Section 14 of the Indians Claims Commission Act allowed petitioner "full and free access to such letters, papers, documents, maps, or records as may be useful * * * in the preparation of any claim instituted under this Act * * *."[18] Yet petitioner offered practically no countervailing evidence relating to its claims; it simply criticized

[18] Since all the pertinent data were equally available to both parties, petitioner has no basis for alleging (Pet. Br. 60-61) that the burden of proof was on the government because the subject matter of the negative averment of nonpayment lay peculiarly within the knowledge of the government.

the government's proof for not being absolutely decisive and failed to controvert the abundant evidence produced by the United States on all contested issues.

(*a*) With respect to the Treaties of 1802 and 1805 (see the Statement, *supra*, pp. 8–11), petitioner claimed a combined deficit of $98,857.50. The G.A.O. Report showed (R. 23–24, 127–128), and the Indian Claims Commission found (R. 267–268), that additional money and goods had been disbursed to the Creek Nation between 1803 and 1818 "which the General Accounting Office cannot definitely and clearly identify as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805." The Commission further found that these unallocated disbursements totaled $99,461.45 and therefore exceeded the amounts claimed by petitioners under the two treaties (R. 269).

Petitioner alleges here (Pet. Br. 13) that the G.A.O. Report failed to take into account all the obligations of the Treaty of 1790, and that the Indian Claims Commission failed to consider possible obligations under that Treaty (Pet. Br. 16). But the G.A.O. Report says of the list of goods sent out between 1800 and 1809 (R. 24): "It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty." As for the possibility of attributing the unallocated disbursements to payments to the medal

chiefs and to Alexander McGillivray (Pet. Br. 12–13), it is not at all clear that anything was due them at the time of the unallocated payments in question. McGillivray, for one, had died in 1793 (R. 199), ten years prior to the first of the payments in question.

(*b*) The evidence on the Treaty of 1832 is narrated in detail in the Statement, *supra*, pp. 11–15. Although petitioner insisted, as it does in this Court (Pet. Br. 19–20; see R. 286, par. 12), that the Treaty of 1845 was irrelevant and immaterial to its claim under the 1832 Treaty and that the Commission erred in mentioning it, it is clear that the Commission correctly considered (R. 270) payments under the 1845 Treaty as directly attributable to the 1832 obligations (see App. C, *infra*, p. 63; the Statement, *supra*, pp. 12–13). Instead of offering evidence of its own, petitioner attempted to exclude consideration of the 1845 Treaty which established payment of the obligations under both treaties. Moreover, petitioner did not refute the government's evidence that during the Civil War the Confederacy had assumed obligations of the United States to the Creek Nation and had in fact paid those federal obligations and that also during that war the United States had made payments for the relief of refugee Indians (see the Statement, *supra*, pp. 12–14).

(*c*) The evidence relating to the government's obligation to furnish a blacksmith and wheelwright under the Treaty of 1833 affords a good example of petitioner's failure to offset the government's proof. The government pointed to statutory limitations on the salaries which could be paid craftsmen. See the Act of June 30, 1834, 4 Stat. 735. Petitioner, with-

out attempting to show that it had needed a blacksmith and wheelwright, claimed that they were worth $1,710 a year (see Br. 21–22), but made no attempt to explain the sums shown to have been disbursed to pay blacksmiths and wagonwrights, which were less than $1,710 a year, before an amount was fixed for them in 1856 (Disbursement Schedules 75 and 76, R. 75–83). Rather, petitioner again chose to rely on its own peculiar reading of the G.A.O. Report instead of coming forward with evidence to support its allegations. (See the Statement, *supra*, pp. 15–18.) Moreover, the government pointed out (see the Statement, *supra*, p. 17) that the Treaty of 1833 did not define the amount or term of the government's obligation. Commencement of the services of the artisans was wholly conditional upon petitioner's need; the educational allowance was wholly in the discretion of the President; and both were to continue only so long as the President saw fit to continue them.

(*d*) With respect to the claim under the Treaty of 1856, nothing need be added to what has already been said (see *supra*, pp. 33–34; the Statement, *supra*, pp. 18–19) other than that the Commission found that the obligation had been fulfilled (R. 272).

In view of the failure of petitioner affirmatively to establish its case and to controvert the evidence produced by the United States, the Commission was fully justified in finding that "[t]here is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged" (Fdg. 10, R. 273).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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APRIL 1962.

APPENDIX A

Treaty Provisions

1. THE TREATY OF 1802

By Article I of the Treaty of June 16, 1802, 7 Stat. 68, between the United States and the Creek Nation, the Creek Nation ceded certain lands to the United States. Article II of the Treaty reads as follows:

> The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandize, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to

the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. And it is further agreed that the United States shall furnish to the said nation two sets of blacksmiths tools and men to work them, for the term of three years.

2. THE TREATY OF 1805

In the Treaty of November 14, 1805, 7 Stat. 96, the Creek Nation ceded certain lands to the United States and agreed that the United States would thereafter have a right to the use of a road through the Creek country. Article III of the Treaty reads as follows:

> Art. III. It is hereby stipulated and agreed on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article, as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Oemulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonably signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole eighteen payments in the course of eighteen years, without interest: The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Oemulgee fields.

3. THE TREATY OF 1832

In the Treaty of March 24, 1832, 7 Stat. 366, the Creek Nation ceded to the United States all their lands east of the Mississippi River. The United States agreed to survey these lands, and then allow Creek Chiefs and heads of Creek families to select parcels which could be patented to them at the end of five years' occupancy. The United States also agreed to pay certain annuities and claims, and $100,000. Article XI provided: "The land hereby ceded shall remain as a fund from which all the foregoing payments except those in the ninth and tenth articles shall be paid." Article XII of the Treaty expressed the desire of the United States that the Creeks remove to the country west of the Mississippi. For this purpose the United States agreed to pay the expense of removal and to support Creeks for one year after their arrival at their new homes. Article XIII, on which one of the claims in this suit is based, reads as follows:

> Article XIII. There shall also be given to each emigrating warrior a rifle, moulds, wiper and ammunition and to each family one blanket. Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. As soon as half their people emigrate, one blacksmith shall be allowed them, and another when two thirds emigrate, together with one ton of iron and two hundred weight of steel annually for each blacksmith. These blacksmiths shall be supported for twenty years.

Article XIV of the Treaty guaranteed the Creeks self-government in their new lands west of the Mississippi.

4. TREATY OF 1833

The Treaty of February 14, 1833, 7 Stat. 417, between the Muskogee or Creek Nation and the United States, established definite boundaries for the lands to be held by the Creeks west of the Mississippi; it provided that these lands were to be the home of the Creeks already there, of those who were still east of the Mississippi, and of the Seminoles as well. Article 5 of this Treaty reads as follows:

> Art. 5. As an evidence of the kind feeling of the United States toward the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmtih and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: And the United States will also cause to be erected, as soon as conveniently can be done, four patent rail way mills, for grinding corn; and will immediately purchase for them twenty-four cross-cut saws. It being distinctly understood, however, that the grants thus made to the Creek Indians, by this article, are intended solely for the use and benefit of

that portion of the Creek nation, who are now settled west of the Mississippi.

5. TREATY OF 1856

In the Treaty of August 7, 1856, 11 Stat. 699, the Creeks ceded part of their lands to the Seminoles, and new boundaries for the Creek lands were set forth. Article V of the Treaty reads as follows:

> Article V. The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individuals thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety, the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural opera-

tions under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five; one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. The following shall also be excepted from the foregoing quitclaim, relinquishment, release, and discharge, viz: the fund created and held in trust for Creek orphans under the second article of the treaty of March twenty-fourth, eighteen hundred and thirty-two; the right of such individuals among the Creeks as have not received it, to the compensation in money provided for by the act of Congress of March third, eighteen hundred and thirty-seven, in lieu of reservations of land to which they were entitled, but which were not secured to them, under the said treaty of eighteen hundred and thirty-two; the right of the reservees under the same treaty, who did not dispose of their reservations to the amounts for which they have been or may be sold by the United States; and the right of such members of the tribe to military bounty lands, as are entitled thereto under existing laws of the United States. The right and interest of the

> Creek Nation and people in and to the matters and things so excepted, shall continue and remain the same as though this convention had never been entered into.

Article VI of the Treaty, upon which one of the claims in this suit is based, reads as follows:

> Article VI. In consideration of the foregoing quitclaim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; four hundred thousand dollars to be paid *per capita*, under the direction of the general council of the Creek Nation, to the individuals and members of said nation, [1] as soon as practicable after the ratification of this agreement; and two hundred thousand dollars shall be set apart to be appropriated and paid as follows, viz: ten thousand dollars to be equally distributed and paid to those individuals, and their heirs, who, under act of Congress of March third, eighteen hundred and thirty-seven, have received money in lieu of reservations of land to which they were entitled, but which were not secured to them under the treaty of March twenty-fourth, eighteen hundred and thirty-two; one hundred and twenty thousand dollars to be equally and

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[1] The Senate amended the Treaty by adding at this point these words (11 Stat. 706): "except such portion, as they shall by order of said national council, direct to be paid to the treasurer of said nation for any specified national object, not exceeding ($100,000) one hundred thousand dollars."

justly distributed and paid, under the direction of the general council, to those Creeks, or their descendants, who emigrated west of the Mississippi River prior to said treaty of eighteen hundred and thirty-two, and to be in lieu of and in full compensation for the claims of such Creeks to an allowance equivalent to the reservations granted to the eastern Creeks by that treaty, and seventy thousand dollars for the adjustment and final settlement of such other claims of individual Creek Indians, as may be found to be equitable and just by the general council of the nation: *Provided however,* That no part of the three last-mentioned sums shall be allowed or paid to any other person or persons, whatsoever, than those who are actual and *bona fide* members of the Creek Nation and belonging, respectively, to the three classes of claimants designated; said sums to be remitted and paid as soon as practicable after the general council shall have ascertained and designated the persons entitled to share therein. And *provided further,* That any balance of the said sum of seventy thousand dollars, which may be found not to be actually necessary for the adjustment and settlement of the claims for which it is set apart, shall belong to the nation, and be applied to such object or objects of utility or necessity as the general council shall direct. The remaining sum of two hundred thousand dollars shall be retained by the United States, until the removal of the Seminole Indians, now in Florida, to the country west of the Mississippi River herein provided for their tribe; whereupon the same, with interest thereon, at five per cent., from the date of the ratification of this agreement, shall be paid over to, or invested for the benefit of the Creek Nation, as may then be requested by the proper authorities thereof. *Provided however,* That if so paid over, it shall be equally divided and paid *per capita* to all the individuals and

members of the Creek Nation, or be used and applied only for such objects or purposes of a strictly national or beneficial character as the interests and welfare of the Creek people shall actually require.

APPENDIX B

The General Accounting Office Report

The General Accounting Report is divided into four main parts. The introductory portions, printed in their entirety in the record (R. 15–18), explain the purpose and scope of the report. Part I of the report, which is also printed in its entirety in the record (R. 18–20), is a summary of the disbursements made by the United States for the benefit of the Creek Nation of Indians from August 7, 1790, to June 30, 1929, taken from the disbursement schedules in Part III. Part II sets out the contentions of the Creek Nation in case No. H–510. Since none of those contentions was particularly relevant to the issues of the present case, none of Part II was in evidence before the Indian Claims Commission or is in the present record. Part III of the G.A.O. Report contains specific information relating to disbursements made by the United States for the benefit of the Creek Nation pursuant to and in connection with various treaties, agreements, and acts of Congress from August 7, 1790, to June 30, 1929. Large portions of Part III are printed in the record (R. 21–129). Part IV contains a complete list of appropriations and funds under which disbursements were made to the Creek Nation. Some of these lists are printed in the record (R. 130–138). Three more of these lists appear in Appendix C, *infra*, pp. 62–63.

Sections A through R of Part III set forth information on disbursements pursuant to specified treaties or agreements. Each of these sections begins by

quoting the treaty provisions which create the obligations; the quotations from the treaty provisions have been omitted in the printed record. Next follows a narration of what the attached statements, abstracts, and disbursement schedules show. The statements summarize the disbursements made pursuant to the particular treaty, listing them according to the reason for which they were made, *e.g.*, depredations, annuities, education, *etc.* The abstracts summarize the disbursements according to the kind of appropriation under which they were made, *e.g.*, Indian Department, Fulfilling Treaties with Creeks, *etc.* Finally, the disbursement schedules give a detailed, year-by-year breakdown of the disbursements to the Creeks.

The introductory discussion in Section A, which shows the disbursements made under the Treaty of August 7, 1790, 7 Stat. 35, is the most thorough of all and describes some of the accounting and reporting problems common to several of the treaties (R. 21–27). This discussion points out that, from 1799 to 1836, Congress appropriated money to pay the annuity promised in the 1790 Treaty, but that the appropriations were listed under a variety of headings. Because of the impracticability of separating all the disbursements according to the changing appropriation titles, the compilers of the report used the general heading "Annuities to Creek Indians." Appropriations from 1837 to 1902 were made under the headings "Fulfilling Treaties with Creeks" or "Fulfilling Treaties with Various Indian Tribes." Disbursements for the period from 1899 to 1902, however, were not included in the sections dealing with particular treaties because of the different way in which they were paid (see R. 118–119). In 1902, Congress converted all the permanent annuities of

the Creek Nation into a lump sum and deposited $999,368 in the Creek General Fund (R. 22, 118).

A further problem discussed in the introductory portion of Section A is that of properly attributing disbursements known to have been made to the treaty under which they were made. Although General Accounting Office was unable to find any amounts disbursed between 1790 and 1809 for annuity goods attributed specifically to the 1790 Treaty, it did find that some annuity goods were furnished to the Creeks during this period (R. 23). After setting forth these amounts, the report continues (R. 24):

> During the years 1790 to 1809, various amounts were advanced to disbursing officers for annuities, but due to the fact that in most instances the names of the tribes for which the annuities were intended are not set out, it is impossible to state what portion, if any, of the amounts set out in the foregoing tabulation were in fulfillment of the aforesaid Treaty of August 7, 1790. It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said Treaty.

This problem of incompletely identified disbursements continued up to 1837, as can be seen from this further comment on the 1790 Treaty (R. 24):

> Due to the incompleteness of the ledger accounts covering the period prior to the year 1837, and the fact that the annuities forwarded to the Creek Nation of Indians, as outlined on pages 102 and 103 [R. 22–24, fols. 29–30],[1]

[1] Because of the great number of cross-references in the record using page numbers of the original report, we have

> can not be definitely identified with a particular treaty and appropriation, it has been found impracticable to set out statements disclosing disposition of moneys appropriated to fulfill the aforesaid Treaty of August 7, 1790, prior to the year 1837. * * *

For the period from 1837 to 1902, there is a slightly different reporting problem (R. 25):

> Due to the fact that various treaties with the Creek Nation of Indians provided for the same objects during the same periods, and the money appropriated to fulfill one treaty was advanced to disbursing officers with money appropriated to fulfill other treaties, *it was found impracticable to set out a balanced statement of moneys appropriated for each treaty separately.* * * * [Emphasis added.]

Thus Statement No. 3 (R. 29-32) shows that, although the General Accounting Office was able to balance the total amount available for disbursement from 1837 to 1902 with the total amount disposed of during that period, it was unable to balance the amounts appropriated for each treaty with the amounts disbursed pursuant to specific treaty provisions from 1837 to 1902. The remainder of the introductory portion of Section A explains the disbursements actually made in as great detail as possible (R. 25-27).

As stated earlier (*supra*, p. 56), Sections A through R of Part III of the G.A.O. Report furnish data on disbursements attributable to specific treaties or agreements. The last two sections of Part III, however, deal with disbursements not attributable to specific treaties. Section S explains how appropriations were made from 1899 to 1902

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printed at the end of this Appendix a table showing where these original pages appear in the record.

and its Statement No. 59 shows disbursements made from July 1, 1898, to June 30, 1929 (R. 118–121).[2] Section T of Part III, set out in its entirety in the record (R. 122–129), deals with disbursements made between 1811 and 1834 which cannot be attributed to particular treaties. The problems connected with Section T are discussed in the Statement, *supra*, pp. 5–6).

Those parts of the General Accounting Office Report printed in the record contain a great number of cross-references using the page numbers of the original report. For the convenience of the Court, we here set out a table of the page numbers in the record, the page numbers of the report, and the folio numbers of the record from the Court of Claims.

Record	Report	Folio	Record	Report	Folio
15	Inside cover	18	32	113	40
	Title Page	19	33	114	41
16	1	20	34	115	42
17	2	21	35	116	43
18	3	22	36	117	44
	4	23	37	118	45
19	5	24	38	119	46
20	6	25	39	120	47
21	97	26		121	48
	100	27		125	49
22	101	28		126	50
	102	29	41	127	51
23	103	30		129	52
24	104	31		130	53
25	105	32	42	131	54
	106	33		132	55
26	107	34	43	133	56
27	108	35	44	134	57
28	109	36		135	58
29	110	37	45	136	59
30	111	38	46	137	60
31	112	39	47	138	61

[2] The first paragraph on R. 118 is from Section Q which is entitled "Disbursements Pursuant to and in Connection with the Agreement of January 19, 1889, ratified by the Act of March 1, 1889; and the Act of May 27, 1902." Section S begins with folio 140 on R. 118. The omission indicated in the middle of R. 118 represents 164 pages in the G.A.O. Report.

Record	Report	Folio	Record	Report	Folio
48	139	62	93	431	113
49	140	63	94	432	114
	141	64	95	433	115
	144	65	96	434	116
50	145	66	97	436	117
51	146	67		442	117a
	147	68		443	118
52	148	69	98	444	119
53	149	70		445	120
	158	71	100	446	121
54	165	72	101	447	122
55	205	73	102	450	123
	272	74	103	451	124
56	297	75	104	452	125
57	298	76	105	453	126
58	299	77	106	454	127
59	313	78	107	455	128
60	319	79	108	456	129
61	320	80	109	457	130
62	321	81	110	458	131
63	322	82	111	459	132
64	323	83	112	460	133
65	329	84	113	461	134
66	333	85	114	462	135
67	334	86	115	479	136
68	335	87	116	480	137
69	336	88	117	481	138
70	342	89	118	508	139
71	371	90		672	140
	377	91	119	673	141
	378	92	120	674	142
73	379	93		675	143
74	380	94	121	676	144
75	381	95	122	681	145
76	382	96		682	146
77	383	97	123	683	147
78	384	98	124	684	148
79	385	99	125	685	149
80	386	100	126	686	150
81	387	101	127	687	151
82	388	102	128	688	152
83	389	103	129	695	153
84	390	104	130	697	154
85	391	105	131	698	155
86	392	106	132	707	156
87	393	107	133	708	157
88	394	108	134	710	158
89	395	109	135	711	159
90	396	110	136	712	160
91	397	111	137	713	161
92	422	112	138	714	162

APPENDIX C

APPROPRIATIONS LIST

"ANNUITIES TO CREEK INDIANS"

(Pursuant to the Treaty of August 7, 1790)

(For disbursements under this appropriation, see Disbursement Schedule No. 1, page 117.) [1]

Year	Act	Stat	Amount appropriated	Year	Act	Stat	Amount appropriated
1799	Feb. 23, 1799	1-618	$1,500.00	1818	Feb. 25, 1799	1-618	$1,500.00
1800	Feb. 25, 1799	1-618	1,500.00	1819	Feb. 25, 1799	1-618	1,500.00
1801	Feb. 25, 1799	1-618	1,500.00	1820	Feb. 25, 1799	1-618	1,500.00
1802	Feb. 25, 1799	1-618	1,500.00	1821	Feb. 25, 1799	1-618	1,500.00
1803	Feb. 25, 1799	1-618	1,500.00	1822	Feb. 25, 1799	1-618	1,500.00
1804	Feb. 25, 1799	1-618	1,500.00	1823	Feb. 25, 1799	1-618	1,500.00
1805	Feb. 25, 1799	1-618	1,500.00	1824	Feb. 25, 1799	1-618	1,500.00
1806	Feb. 25, 1799	1-618	1,500.00	1825	Feb. 25, 1799	1-618	1,500.00
1807	Feb. 25, 1799	1-618	1,500.00	1826	Feb. 25, 1799	1-618	1,500.00
1808	Feb. 25, 1799	1-618	1,500.00	1827	Feb. 25, 1799	1-618	1,500.00
1809	Feb. 25, 1799	1-618	1,500.00	1828	Feb. 25, 1799	1-618	1,500.00
1810	Feb. 25, 1799	1-618	1,500.00	1829	Feb. 25, 1799	1-618	1,500.00
1811	Feb. 25, 1799	1-618	1,500.00	1830	Feb. 25, 1799	1-618	1,500.00
1812	Feb. 25, 1799	1-618	1,500.00	1831	Feb. 25, 1799	1-618	1,500.00
1813	Feb. 25, 1799	1-618	1,500.00	1832	June 4, 1832	4-527	1,500.00
1814	Feb. 25, 1799	1-618	1,500.00	1833	Feb. 20, 1833	4-616	1,500.00
1815	Feb. 25, 1799	1-618	1,500.00	1834	June 26, 1834	4-681	1,500.00
1816	Feb. 25, 1799	1-618	1,500.00	1835	Mar. 3, 1835	4-788	1,500.00
1817	Feb. 25, 1799	1-618	1,500.00	1836	June 14, 1836	5-44	1,500.00

[1] This table appears at p. 696 of the G.A.O. Report.

"FULFILLING TREATIES WITH CREEKS"

(Pursuant to the Treaty of January 4, 1845)

(For disbursements under this appropriation, see Disbursement Schedule No. 86, pp. 430 to 434.) [1]

Year	Act	Stat.	Amount appropriated	Year	Act	Stat.	Amount appropriated
1847	June 27, 1846	9-28	$6,000.00	1857	Aug. 18, 1856	11-79	$6,000.00
1848	Mar. 1, 1847	9-136	3,000.00	1858	Mar. 3, 1857	11-173	6,000.00
1849	July 29, 1848	9-255	3,000.00	1859	May 5, 1858	11-278	6,000.00
1850	Mar. 3, 1849	9-385	3,000.00	1860	Feb. 28, 1859	11-393	6,000.00
1851	Sept. 30, 1850	9-547	3,000.00	1861	June 19, 1860	12-49	6,000.00
1852	Feb. 27, 1851	9-577	6,000.00	1862	Mar. 2, 1861	12-225	6,000.00
1853	Aug. 30, 1852	10-44	6,000.00	1863	July 5, 1862	12-510	6,000.00
1854	Mar. 3, 1853	10-228	6,000.00	1864	Mar. 3, 1863	12-778	6,000.00
1855	July 31, 1854	10-319	6,000.00				
1856	Mar. 3, 1855	10-699	6,000.00				90,000.00

"INDIAN DEPARTMENT"

(For disbursements under this appropriation, see Disbursement Schedules Nos. 4, 9, 11–13, and 107, pp. 136, 149, 157, 196, and 687 to 689.) [2]

Year	Act	Stat.	Amount appropriated	Year	Act	Stat.	Amount appropriated
1805	Feb. 14, 1805	2-315	$92,000.00	1814	Mar. 19, 1814	3-105	$464,500.00
1806	Apr. 18, 1806	2-315	90,000.00	1815	Mar. 3, 1815	3-223	200,000.00
1807	Jan. 10, 1807	2-413	108,000.00	1816	Apr. 20, 1816	3-330	200,000.00
1808	Mar. 3, 1808	2-470	140,000.00	1820	Apr. 14, 1820	3-583	200,000.00
1809	Mar. 3, 1809	2-545	127,000.00	1821	Mar. 3, 1821	3-634	230,205.44
1810	Mar. 2, 1810	2-563	146,000.00	1822	May 7, 1822	3-687	145,000.00
1811	Feb. 6, 1811	2-616	140,500.00	1823	Mar. 3, 1823	3-749	90,000.00
1812	Feb. 21, 1812	2-683	164,500.00	1824	May 26, 1824	4-30	95,000.00
1812	July 6, 1812	2-781	20,000.00	1825	Mar. 3, 1825	4-9	95,000.00
1813	Mar. 3, 1813	2-823	164,500.00	1828	May 9, 1828	4-268	100,000.00

[1] This table appears at p. 713 of the G.A.O. Report.
[2] This table appears at p. 718 of the G.A.O. Report.